

A Guide for the Litigation of Economic, Social and Cultural Rights in Zimbabwe

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It was also made possible thanks to the contribution of the Ministry for Foreign Affairs of Finland.



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Acknowledgements

This Guide is published by the International Commission of Jurists (ICJ), in conjunction with the work of its Africa Regional Programme, in particular its projects on the promotion of human rights and the rule of law in Zimbabwe.

This Guide is an adaptation of the International Commission of Jurists' Practitioners Guide No. 8: "Adjudicating Economic, Social and Cultural Rights at National Level" that was written by Sandra Ratjen, ICJ Senior Legal Adviser, specializing in ESC rights.

The adaptation was researched and written by Sandra Ratjen and Justice Mavedzenge with the assistance of Pauline Sauvadet. Arnold Tsunga and Brian Penduka provided comments. Ian Seiderman and Jill Heine provided legal review.

The ICJ is also grateful to the Law Society of Zimbabwe, which mobilized a group of their member-lawyers to participate in a jointly organized workshop that took place in Zimbabwe on 25-26 June 2015. At the workshop very useful feedback and comments on the draft of this Guide were received. The provision of feedback and comments does not, however, imply that those who took part in the conference endorse the content of present publication. The ICJ remains solely responsible for the content of this publication.

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List of Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACnHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	Convention for the Protection of All Persons from Enforced Disappearance
CEDAW	Convention 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	Convention on the Rights of the Child
CRPD	Convention 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
ICCPR	International Covenant on Civil and Political Rights
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
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
OP-CEDAW	Optional Protocol to the Convention on the Elimination of Discrimination against Women
OP-CRC	Optional Protocol to the Convention on the Rights of the Child on a communications procedure
OP-CRPD	Optional Protocol to the 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
UN	United Nations
WHO	World Health Organization
ZHRC	Zimbabwe Human Rights Commission

Introduction

This Guide aims at providing legal practitioners and human rights advocates with updated knowledge about the applicable standards for the protection of economic, social and cultural rights (ESC rights) in Zimbabwe, as well as at highlighting and illustrating the role that legal remedies, including judicial remedies, can and should play in this protection.

Basic facts about ESC rights

Economic, social and cultural rights (ESC rights) as defined in international law to which Zimbabwe has subscribed through the ratification of or accession to relevant human rights treaties include: the equal rights of all to decent work; to social security; to adequate housing, food, water and sanitation; to health; to education and to participate in cultural life. The principal international treaty guaranteeing ESC rights is the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹ To date, 164 States, including Zimbabwe, are parties to it and have thus accepted to implement its provisions in good faith.

Like any other human rights, ESC rights entail both freedoms and entitlements. States are required to refrain from doing harm and depriving people of their rights. They also are required to take measures to prevent others from doing harm. States must also take a range of action towards ensuring and securing an always-greater level of enjoyment of the rights by all.

ESC rights are linked to but are not the same as development. All States, independently of their level of development, can and have to do their best efforts to guarantee at least the minimum level of these rights, without discrimination,

¹ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), UN Doc. A/6316.

and to have plans to increase their enjoyment, even if some efforts will take time and resources are limited.

ESC rights have long been misconceived. For instance, the right to housing does not mean that the State will have to provide a house to everyone; or the right to health does not mean that everyone has the right to be healthy.

However, as will be shown in this guide, important progress has been realized in the definition and delineation of the normative content of the rights and the scope of the corresponding State obligations under the ICESCR and other relevant international human rights treaties.

The Guide is an adaptation of existing publications elaborated by the ICJ in the last years. It is largely based on the ICJ Practitioners Guide No. 8: "Adjudicating Economic, Social and Cultural Rights at National Level". It is also based on the ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" (hereafter the *ICJ Justiciability Study*).² In addition, the Guide draws on the ICJ "Commentary to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights".³ It builds on lessons from the ICJ's work in various countries and, in particular, it has been informed by various processes aimed at investigating and assessing access to jus-

² Report published in 2008 as the 2nd volume of the Human Rights and Rule of Law Series, available at:

<http://icj.wengine.netdna-cdn.com/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf>

³ 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-internacional-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/>

tice and the availability and effectiveness of remedies for victims of ESC rights' violations.⁴

Moreover, the present Guide benefits from the input and insight of legal practitioners from Zimbabwe, who have been consulted during its elaboration.

With the adoption of the Constitution of Zimbabwe Amendment (No.20) of 2013, the country has equipped itself with an important normative framework for the protection of human rights including ESC rights. This framework includes a Declaration of Rights that enshrines a number of ESC rights as guaranteed in international law, the obligation for courts to take into account international law and all treaties to which Zimbabwe is party in interpreting this Declaration of Rights,⁵ and some important provisions facilitating access to courts by all in cases of alleged violations of the rights.⁶ Considering this new framework and the current and upcoming legislative and regulatory adaptations it brings, the ICJ is convinced that the present publication can contribute to the ongoing efforts to fulfil the promises of the reform on which the country has embarked in 2013.

Content of the Guide

To fulfil its objectives, the Guide combines a compilation of applicable standards with practical examples of how they have been interpreted and enforced.

⁴ See the two country studies on ESC rights 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/>. See also 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/>

⁵ Section 46 (1) (c) of the Constitution of Zimbabwe Amendment (No.20) of 2013.

⁶ Section 69 (3) of the Constitution of Zimbabwe Amendment (No.20) of 2013.

To set the scene, Chapter 1, “ESC rights and the role of judicial and quasi-judicial bodies”, provides, in summary form, certain basic information on ESC rights as they have developed under international law, their justiciability and the right to an effective remedy in this context, as well as fundamental discussions on the main aspects of the litigation process in cases of threats or violations of these rights.

Chapter 2, “Applicable International Standards for the Protection of ESC Rights in Zimbabwe”, goes into more details about global and regional norms, jurisprudence and mechanisms.

Chapter 3, “ESC Rights under the Constitution of Zimbabwe”, provides a detailed analysis of the constitutional protection of ESC rights since the adoption of the 2013 Constitution of Zimbabwe Amendment (No.20) Act.

In all chapters, and whenever relevant, the Guide proposes references to ICJ and other resources for further reading and more detailed analysis. It offers information about tools for practitioners at the national level who want to bring cases of alleged violations of ESC rights to judicial and quasi-judicial bodies. A “toolbox” compiling these resources is annexed to this Guide.

Finally, the jurisprudence⁷ cited in this Guide is indicative of the range of legal authority 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 centralize case law databases that are referred to at the end of this Guide.⁸ 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 similar jurisdictions and

⁷ In the context of the present Guide, the term “jurisprudence” is used to describe both decisions of courts and commentaries of quasi-judicial bodies.

⁸ See toolbox in Annex 1.

in relation to various rights and legal issues at stake, have found ways to protect ESC rights. In this resource that is specific to the context of Zimbabwe, the case-law examples chosen have been selected, as much as possible, for their particular relevance for the said context.

Chapter 1: ESC rights and the role of judicial and quasi-judicial bodies

This chapter offers a summary of basic information on the growing acceptance of the justiciability of 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 describes key considerations that should be kept in mind by legal practitioners who are involved in ESC rights litigation in Zimbabwe. The reference to domestic law in this chapter is meant to be general and shall not be understood to refer to Zimbabwean law, unless explicitly mention as such. Chapter 3 provides for the specific reference and application to Zimbabwean law.

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.*⁹

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

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 negative effect at both levels, in a mutually reinforcing manner, has effectively precluded many judicial and quasi-judicial bodies

⁹ ICJ publication "Courts and the Legal Enforcement of Economic, Social and Cultural Rights – Comparative Experiences of Justiciability" [hereafter the *ICJ Justiciability Study*], p. 1.

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.

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. The first argument regarding the excessive vagueness of ESC rights has been largely defeated by the developments in the interpretation of international and national standards. This interpretation has proved that the content of ESC rights is not fundamentally different from that of civil and political rights. All rights encompass a mix of freedoms and entitlements, and impose both negative and positive obligations on States. The general character of the provisions guaranteeing rights in international treaties and in domestic constitutions and law is not restricted to just ESC rights; just like for all rights, statutory and regulatory elaboration, as well as interpretation by the appropriate monitoring or adjudicative bodies are needed to specify the content of ESC rights.

Other arguments against the justiciability of ESC rights 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. However, judicial and quasi-judicial bodies have found their way around purported obstacles to the justiciability of ESC rights, hence proving that courts and other judicial bodies can and shall fulfill their role in the realization of ESC rights.

At the international level, the prejudices against the justiciability of ESC rights had, for a number of years, meant that these rights did not receive the attention and treatment accorded to

civil and political rights within some mechanisms of the international community.

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.¹⁰ In addition, other human rights treaties also came with communication procedures, as opt-in provisions or as separate optional protocols.¹¹ Nevertheless, it was not until 10 December 2008 that a similar protection mechanism was finally adopted in relation to the rights enshrined in the ICESCR, under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).¹² On 5 May 2013, three months after the deposit of the 10th instrument of ratification to the Optional Protocol, the new instrument finally

¹⁰ 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].

¹¹ See 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) [hereafter OP-CEDAW]; 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-CRPD]; 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 CAT]; 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 ICMW].

¹² 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.

entered into force. It provides for remedies to victims of violations of economic, social and cultural rights. It establishes a mechanism that enables the Committee on Economic, Social and Cultural Rights (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 that regard, it is important to highlight that the development of authoritative commentaries (so-called *General Comments*) and jurisprudence by UN treaty bodies has a significant impact on the availability and effectiveness of domestic remedies, as well as on the development of jurisprudence and standards on ESC rights at the national and regional levels. Given that Section 46 of the Constitution of Zimbabwe obliges consideration of international law in interpreting fundamental rights guaranteed under the Declaration of Rights, judicial and quasi-judicial bodies in Zimbabwe, and the *country's* legal practitioners in general, must have regard to this growing body of jurisprudence in enforcing the rights contained in the Constitution of Zimbabwe.¹³

2. From justiciability to access to justice

The growing general acceptance of the justiciability of ESC rights is undoubtedly significant progress. It has, and must continue 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.

The right to an effective remedy must be guaranteed including in cases of violation of ESC rights.

¹³ For a more detailed discussion of section 46 of the Constitution of Zimbabwe, please see Chapter 3 of the present Guide.

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

It is a general principle of law that every right must be accompanied by 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.¹⁴

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.¹⁵

¹⁴ 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 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/>

¹⁵ See, for example, article 2(3) of the ICCPR; article 13 of the CAT; 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); article 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

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".¹⁶ 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."¹⁷

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*,¹⁸ 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

force 15 March 2008), English translation reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005).

¹⁶ Article 8 of the UDHR.

¹⁷ Article 4 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

¹⁸ 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).

*for the violation; and (d) Provide effective remedies to victims, including reparation, as described below.*¹⁹

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.²⁰ 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 ensuring governmental accountability must be put in place".²¹ 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".²²

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

¹⁹ 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.

²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24, 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.

²¹ Committee on Economic, Social and Cultural Rights, General Comment No. 9, *supra* note 20, para. 2.

²² *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.

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.”²³

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 relevant regional or global judicial and quasi-judicial bodies.²⁴

²³ 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 forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”

²⁴ 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-CEDAW; article 2(d) of the OP-CRPD; or article 7(e) of the OP-CRC. See also article 56.5 of the African Charter on human and Peoples’ Rights. In its jurisprudence, the African Commission on Human and Peoples’ Rights has interpreted the exceptions to the necessity of exhausting domestic remedies as extending beyond delays to instances in which these remedies are unavailable, ineffective and inefficient (see notably *Sir Dawda K. Jawara / Gambia 147/95 - 149/96*, at para.31).

b) The position of ESC rights in domestic legal frameworks

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 be exhausted before a victim may resort to international complaint mechanisms.²⁵

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.

The provisions of the ICESCR are a primary source of ESC rights obligations. Those provisions must be read in conjunction with the General Comments of the CESCR as an overarching interpretive framework for ESC rights. However, the ICESCR is not the only treaty source of ESC rights. The Convention on the Rights of the Child (CRC) 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 (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD) containing several particular ESC rights provisions. Finally, a number of regional treaties establish ESC rights obligations, including the Addi-

²⁵ See *supra* note 24.

tional 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,²⁶ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),²⁷ and the Revised European Social Charter.²⁸ The African regional instruments are described in more details in Chapter 2 of the present Guide.

In the light of these mutually reinforcing international human rights law provisions, and with a view to fully and unambiguously comply with these, several States, like Zimbabwe, 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.

The guarantee and protection of ESC rights in national constitutions, or at least in primary legislation, typically provide 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 ensuring access to justice for victims of rights violations.

In addition to constitutional guarantees, the recognition and operationalization of ESC rights in administrative law and regulations also play a fundamental role since many constitutions and legislation of a more general nature may only set out

²⁶ 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.

²⁷ 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.

²⁸ For a more detailed account of the UN and African human rights systems, please refer to Chapter 2, Section III.

overarching principles and protections. The spelling out of modalities to implement constitutional and/or treaty rights is crucial to make justice accessible to all and impose the enjoyment of rights in practice.

c) The role of the judiciary in the protection of ESC rights

While, 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, the role of the courts in the protection of ESC rights is fundamental.

Indeed, courts and other adjudicative bodies cannot alone 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, monitoring and action by the executive and legislative branches of the State. This is also true for civil and political rights, which similarly require implementing legislation, policies and the availability of services and infrastructure. In addition, as mentioned in subsequent parts of this Guide, in some cases, mechanisms other than courts may be more suitable to reach a timely and satisfactory settlement.

However, despite the fact that judicial action is not the exclusive means of implementation and redress, litigation is not only an instrument to ensure compliance with ESC rights but also to guarantee the realization of the right to an effective remedy.

In addition, 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 such as Zimbabwe is in fact essential to the protection of ESC rights.

II. Strategic Considerations around litigation

Given the role of litigation for the realization of rights, lawyers who are involved in ESC rights litigation and want to bring cases to courts and other judicial or quasi-judicial bodies should take into consideration various key elements at the different stages of the litigation process.

First and foremost before initiating a court procedure, lawyers and their clients will have to make sure that litigation is the best way of obtaining justice and satisfaction in cases of alleged violations of ESC rights. This will require assessing the normative framework in which litigation takes place, the jurisprudence of the court(s) approached so far as well as the remedies that should be sought and can be obtained.

In addition, aside from the questions detailed in the subsections below, significant 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 a significant share of litigation of ESC rights involves two private parties, the adjudication of ESC rights, as with other human rights, intrinsically and essentially involves aggrieved individuals and the State or public authorities. This poses a number of issues that include:

- 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 possible power imbalance between the parties in the case;
- The possible deference of the judiciary towards decisions, omissions and actions of the executive and the legislative branches, striking the balance between the need to guarantee the right to an effective remedy and the separation of powers;
- The difficulties in enforcing judgments on remedies, including injunctions and orders against the State and governmental power at various levels.

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 of the independence of the judiciary must be guaranteed.²⁹ In particular, provisions related to requirements for selection based on education, qualifications and integrity, and guarantees of conditions and security of tenure of judges, may influence their ability to take decisions against the State's acts or omissions and to order systemic remedies.

However, whatever the specificities of the legal system and the procedural law of a particular country may be, judges have in numerous cases acted in the "interest of justice" to proactively protect rights. While especially in high profile and sensitive cases, judiciaries may be hesitant to uphold human rights against the interests of the State, the Zimbabwean judiciary's decisions in the first few ESC rights cases since the adoption of the new Constitution indicate that the judiciary can actually be effective in protecting people's constitutional rights.³⁰

1. Initiating a case

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 ex-

²⁹ 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.

³⁰ See the landmark judgments of the Courts in the following cases, wherein the court protected the rights concerned; *Peter Makani and others v Epworth Local Board and Others* HH 550-14, *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195, *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14. Also see *St Gorges College Parents and Teachers Association v Minister of Education, Sport and Culture and Another* [2004] ZWHHC 112 that was decided prior to the adoption of the current Constitution.

ample, from the law of delict, 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 pursued and, if so, the most appropriate jurisdiction in which to do so.

a) 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.³¹

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.³² 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, although it varies from country to country, rights holders typically know little about their rights and/or about the possibilities for the legal protection of their rights. For instance, the laws and important judicial decisions pertaining to ESC rights

³¹ See the detailed discussion on State obligations in Chapter 2 of the present Guide.

³² 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.

are often only published in an official gazette, law reports or similar documents that have 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 throughout the population of a country. One contribution that has been made to this end is the development and maintenance of case law databases by judiciaries and legal practitioners.³³ In addition, there are education and transparency initiatives, such as, in El Salvador, where the Constitutional Court judges regularly dedicate time to informing people about their work, the Constitution and the rights it protects.³⁴ In Kenya, a pilot programme was launched in 2013 to train all undergraduates of the Laikipia University in international and national human rights standards.³⁵

Awareness of rights holders about their rights is not only indispensable in the abstract but even more so when they become actual victims of violations. Depending on the gravity and particular facts and legal issues raised, as well as the scope of the remedies sought, lawyers may 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 vic-

³³ See toolbox in Annex 1 of this Guide.

³⁴ The website of the Constitutional Chamber of the Supreme Court of El Salvador is accessible at: http://www.csj.gob.sv/SALAS_CSJ.html#

³⁵ 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>

tims are aware of this potential and agree to 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 achieved through the public campaign and advocacy around the case.³⁶

Civil servants and duty bearers also need to be aware of the legal framework and principles they must respect when delivering public goods and services that are necessary to realize ESC rights. 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 complaints 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

³⁶ 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. See, for instance, Dugard, Jackie, in "Socio-Economic Rights in South Africa: Symbols Or Substance?"

of adequate reparation as understood by international law, which includes guaranteeing non-repetition.³⁷

In that regard, it is interesting to note progress in the human rights training of civil servants in some countries. For example, in Bolivia the State initiated a new educational programme for all civil servants to train them about the prohibition of discrimination in public administration.³⁸

b) 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 international level, lawyers may have the choice of a regional human rights system or 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 of forum at the international or regional level. 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;

³⁷ 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 at: <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>

³⁸ 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

- 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. Legal practitioners may have to consider various areas of domestic law including administrative, civil or criminal law.

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

For instance, in Zimbabwe, in cases of violations of section 68 of the constitutional right to fair administrative action, which resulted in violations of a range of ESC rights, a lawyer may advise a client to lodge an action in the specialized Administrative Court rather than the High Court because there are more chances that the matter will be heard and determined faster in the Administrative Court than in the High Court.

c) 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 per-

sons who have suffered harm in intervening to assist victims in distress or to prevent victimization."³⁹

It is interesting to note that 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.⁴⁰

More generally, ESC rights, like other human rights, require remedies for violations suffered by individuals. A great number of ESC rights violations also have a collective dimension and in addition to requiring a particular remedy to redress the harm to the particular litigant, also 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,⁴¹ the right of trade unions to function freely,⁴² or the right to strike⁴³ are essentially exercised collectively.

³⁹ 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).

⁴⁰ 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.

⁴¹ Article 8.1 b) of the ICESCR.

⁴² Article 8.1 c) of the ICESCR.

⁴³ Article 8.1 d) of the ICESCR.

Additionally, victims of ESC rights often belong to the most disadvantaged and marginalized sectors of society. The material obstacles that justice users usually face can therefore be especially daunting for victims of ESC rights violations. 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. This includes class actions by which a group of persons in the same situation can be represented by one of its members, without having to each initiate a lawsuit. As will be shown in Chapter 3, Zimbabwe's new legal framework provides for some good practices in that regard. In particular, section 85 (4) of the Constitution of Zimbabwe makes provisions for public interest litigation; for keeping formalities to the minimum, and for the reception of *amicus curiae* by courts.

Public Interest Litigation (PIL) and ESC rights

Contrary to private or civil litigation, one of the main characteristics of Public Interest Litigation (PIL) is to redress a public wrong and to uphold a public right, i.e. a human or constitutional right, against the wrong doing of the State as the primary duty-holder. PIL may be more suitable in addressing situations in which it is either undesirable or impossible to limit the claims to specific members of the public. A side effect of PIL is that it often can compel unwilling authorities to finally act in compliance with their obligations by raising public awareness of implementation gaps of constitutional or human rights standards.

India is undoubtedly the most emblematic example of a jurisdiction where PIL has been developed and used for the advancement of ESCRs of large societal groups. The groups represented in Indian PIL have included some of the most marginalized and at risk, such as rape victims, children, persons in custody, rickshaw drivers and pavement dwellers.

As developed by the Indian Supreme Court, Public Interest Litigation (PIL) has three main characteristics of particular relevance. Firstly, PIL is a “judicially created procedural vehicle” through which a creative and proactive judiciary allows an individual or organization to seek judicial redress against a violation of constitutional rights, even if the applicant is personally unaffected by the violation. In addition, further procedural flexibility has allowed adapting the court procedures to the constraints and realities experienced by poor and disadvantage groups, especially by lowering the degree of formality for petitions. Thirdly, the concept of PIL implies a change in the nature of procedure and litigation away from an adversarial model to a model that provides more of an opportunity for a triangular constructive dialogue between respondents (i.e. State authorities and agents), petitioners and experts in case specific/relevant disciplines. Finally, PIL aims to redress systemic social injustice to the benefit of the most marginalized and disadvantaged groups of society. Departing from this ultimate goal, PIL cannot follow the traditional adversarial approach as public interest should imply a process of “ascertaining the duties and obligations of the [S]tate in relation to its citizens”.

Eventually, for PIL to be able to deliver social justice and the greater enjoyment of ESCR of all, including marginalized and excluded groups, it must meet a number of aspirations. It must remain within the legitimate borders of democratic rules while meeting the aspirations of the groups who will be the most directly impacted by the decisions and remedies ordered, that is, in cases in which the group may be effectively defined. Further, it must respond to the aspirations of social movements, in cases in which the particular human rights or constitutional rights issue at play is more diffuse, and concerns a larger part of society across definable groups.

d) The importance of third party information and intervention

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 structural issues underlying individual cases. They also may bring essential analysis, offer expert opinions and evidence to a case and/or may be able to assist in the formulation of recommendations for appropriate remedies.

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. Zimbabwean CSOs must consider playing an active role in ongoing ESC rights litigation, particularly by way of *amicus curiae briefs*, providing the courts with valuable information for example about relevant international human rights law and/or comparative law, legal arguments or how the ruling in a case might affect people who are not parties to the case.

Such amicus briefs may therefore assist the courts to more clearly and widely define the scope and content of the rights enshrined under the Declaration of Rights, in a manner that is at least consistent with Zimbabwe's obligations under international human rights law. Judicial and quasi-judicial bodies at all levels may benefit greatly from interventions of third parties and experts; their involvement at early stages, and in first instance proceedings may help to ensure that an "ESC rights perspective" is integrated into the case from the start of a legal action.⁴⁴

⁴⁴ 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:

e) Material accessibility of judicial and quasi-judicial bodies

Much attention has been given to obstacles that victims of violations of human rights face in accessing judicial and quasi-judicial bodies and the justice system when seeking a remedy for such violations.⁴⁵ A lack of adequate financial resources is frequently identified as an obstacle to access to justice by victims of violations of human rights globally. This obstacle is generally even more severe for victims seeking remedies for violations 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, focusing mostly or exclusively on criminal law matters;

<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/>

⁴⁵ 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.

- 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 legal 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, particularly 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 recognized even in countries with limited resources. In fact, the need to fund and develop legal aid to ensure that victims of human rights violations -including violations of ESC Rights- has been recognized and included in projects that can benefit from support in the context of international cooperation and assistance. Legal aid is explicitly recognized as a fundamental element for the realization of ESC rights- and the right to a remedy for violation of ESC rights under article 2 of the ICESCR.⁴⁶ The initiative for the establishment 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, and international donors.⁴⁷

⁴⁶ Article 2 (1) of the ICESCR.

⁴⁷ For an analysis of the pilot project of Legal Aid Botswana, 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

In addition to receiving legal assistance *pro bono* from private lawyers, ESC rights litigants have sometimes relied on the support of a growing number of law clinics at universities which can play a quite significant role in preparing and otherwise supporting litigation.⁴⁸

Judicial and quasi-judicial bodies have ensured protection of procedural rights of litigants and taken into consideration the weaker position of the rights-holders as parties in a case, as the case described below, decided by the Russian Constitutional Court, illustrates.

Holding No. 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 Back-ground:	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 Arch-

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/>

⁴⁸ For a non-exhaustive list and contact details of law clinics at universities offering support of litigation see toolbox in Annex 1 of this Guide.

angelsk in an attempt to recover compensation for legal expenses, including power of attorney and cost of the attorney's legal services, arising from a labor dispute between the two parties. The Court ruled against "Red Star Consulting" LLC, while 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 Russia 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>

f) The role of National Human Rights Institutions

National human rights institutions, including human rights commissions, may play a significant and pro-active role in the legal enforcement of ESC rights, especially when they comply with certain standards including in relation to their independence and benefit from sufficient capacities and resources.

National human rights commissions, depending on their specific mandates, may have a range of possibilities to address and contribute to the redress of violations of ESC rights. If they possess policy monitoring and advisory prerogatives on human rights issues in their country, they can draw attention to potential and occurring systemic violations of ESC rights and can contribute to preventing them. Many can also take an active role in bringing cases to courts.

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

The so-called *Bhe* case, decided by the Supreme Court of South Africa in 2005, offers a good example of the ways in

which a national human rights institution can contribute to the protection of ESC rights.⁴⁹ In this emblematic case, the Constitutional Chamber found certain provisions concerning inheritance, drawn from customary law, to be discriminatory against women and extra-marital children and to be unconstitutional and invalid because they contradicted the equality provisions of the Constitution. The South African Human Rights Commission had joined the case 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.

The Zimbabwe National Human Rights Commission

As described with more details in Chapter 3, Section V. 2, the 2013 Constitution of Zimbabwe established the Zimbabwe Human Rights Commission (ZHRC) that is mandated with core functions of promotion of awareness, respect and protection of human rights, monitoring, research, investigations and inspections and consideration of complaints.⁵⁰

2. 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 before judicial and quasi-judicial bodies will require the plaintiff to gather sufficient information in the form of admissible evidence to sustain the required burden of proof.

As alluded at the beginning of Section II above, a certain imbalance is likely to occur when an individual, or a group of in-

⁴⁹ *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).

⁵⁰ Sections 242-244 of the Constitution of Zimbabwe.

dividuals, seeks to complain against a wrong-doing by the State and its authorities, which are likely to have greater access to certain information.

With a view to addressing some of these imbalances, it is important to give due attention to the State's obligations to respect and protect the right to information, guaranteed, among other sources, under article 19 of the International Covenant on Civil and Political Rights, to which Zimbabwe is a State party.⁵¹ The Human Rights Committee and other international standards clarify that the right to information includes not only the right to exchange and impart information as part of the right of freedom of expression, but also to access to and to receive information from public authorities.⁵² The right to information 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. The new

⁵¹ 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).

⁵² See for instance, Human Rights Committee General Comment 34 on ICCPR article 19 Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, para 11. See also Tshwane Principles, Global Principles on National Security and the Right to Information (2013), available at: <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."

Constitution of Zimbabwe guarantees the right to access to information under section 62 of the Constitution, and mandates the promulgation of legislation to give effect to the right and the permissible restrictions to it prescribed by the Constitution.

Not all ESC rights cases will have a high degree of complexity and be challenging in terms of the production of evidence. However, evidentiary challenges will particularly arise in complex cases and/or those raising structural issues of failing public policies, which demand systemic remedies. For instance, in 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, the plaintiffs may have to produce alternative impact assessments, expert reports on environmental impact, or forensic medical evidence of the impact of certain pollutants on human health or the changes in the ecosystem upon which these individuals rely for their livelihoods. Like in other types of litigation, in ESC rights litigation it is also likely that a causal link between an act or omission and the harm caused to the alleged victim(s), will have to be established.⁵³

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 complainant 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 taken or the absence of measures are reasonable or proportionate to the goal pursued.

⁵³ The problem of establishing the causality link is also posed notably in cases of occupational health for instance.

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."*⁵⁴

In addition, the European Court of Human Rights, in a case dealing with indirect discrimination faced by Roma students in the Czech Republic,⁵⁵ 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 of victims to prove indirect discrimination, recognized the need to accept a variety of evidence, including 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.⁵⁶

⁵⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3, contained in UN Doc. E/1991/23 (1990), paras. 9 and 10.

⁵⁵ *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.

⁵⁶ *D.H. and others v. the Czech Republic*, European Court of Human Rights, Application No. 57325/00, Grand Chamber Judgement, 2007, paras. 186-188.

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”.⁵⁷

Case law examples show how judicial and quasi-judicial bodies in the domestic context deal with the 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.

Hence in many jurisdictions, labour law and procedures recognized the weaker position of the workers.

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.⁵⁸ 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.

⁵⁷ *Ibid.*, para. 189.

⁵⁸ See Chapter 2, Section I. 1. b).

In some cases, judicial and quasi-judicial bodies will be reluctant to contradict the argument of the State. However, some 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 of the South African Supreme Court. The *Blue Moonlight Properties* case constitutes one such instance.⁵⁹

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 Back-ground: The case related to the occupants (also referred to as occupiers) of 7 Saratoga Avenue - a community of 86 poor people living in a disused industrial property in Berea, Johannesburg. In 2006, the owner of the property brought eviction proceedings against them. The question submitted for the decision of the court was whether the occupiers must be evicted to allow the owner to exercise its rights regarding the property and, if so, whether the eviction of the occupants gave rise to the obligation of the City to provide

⁵⁹ *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.

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 Constitutional Court upheld the order of the Supreme Court of Appeal [SCA] ordering the eviction of the occupants 14 days after the City was ordered to provide those occupants 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 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,⁶⁰ 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 its claim of the non-feasibility of restoring the land, to be absent or inadequate.

The Court in particular reproached the State for not having conducted a feasibility study. With regard to 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.

⁶⁰ *The Baphiring Community v. Tshwaranani Projects CC*, Supreme Court of Appeal of South Africa, Case 806/12 [2013], ZASCA 99 (2013).

But it does mean that it will be required to place credible evidence before the court to justify this assertion.”⁶¹

c) Useful tools and allies in producing evidence

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

As far as documentary evidence is concerned, useful resources include the information set out in documents submitted in relation to the periodic review by treaty-bodies of the State’s implementation of the human rights treaties, and in documents of or held by United Nations bodies and mechanisms, including specialized agencies.⁶²

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.⁶³ In particu-

⁶¹ *The Baphiring Community v. Tshwaranani Projects CC*, Supreme Court of Appeal of South Africa, Case 806/12 [2013], ZASCA 99 (2013), para. 22.

⁶² For more details see toolbox in Annex 1.

⁶³ See Guiding principles on human rights impact assessments of trade and investment agreements, in United Nations Special Rapporteur on the right to food, Addendum to Report, UN Doc. A/HRC/19/59/Add.5 (2011); see also

lar, States have often been advised to conduct human rights impact assessments in the area of trade and investment.⁶⁴ In addition, the Committee on the Rights of the Child has clarified that ensuring the best of interest in all actions concerning children requires a continuous process of child impact assessment and impact evaluation including in the design of the development policies.⁶⁵

Such impact assessments may be and/or provide useful evidence for litigators.

3. Main standards of review

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.

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 device to map out risks on ESC rights and their relationship with States obligations under the ICESCR.

⁶⁴ 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. 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, Report on mission to the World Trade Organization, UN Doc. A/HRC/10/5/Add.2 (2009), paras. 37 and 38.

⁶⁵ 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.

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, thus remain the main forum for 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.

However, other jurisdictions (such as civil or administrative courts) and bodies of law in addition to or other than constitutional law (such as the law of delict, labour law or administrative law)-may be at play in ESC rights litigation.

Many claims that are relevant for ESC rights and even emblematic decisions are initiated as civil and administrative matters. Civil courts and even administrative bodies often contribute to constitutional review and protection of ESC rights

through specific domestic procedures enabling referral of questions to higher/constitutional courts.⁶⁶

The categories of standards used in constitutional review, listed below, are intended to illustrate the cases under discussion. The list is by no means exhaustive. In many cases, especially those entailing complex facts and points of law, several standards or principles will be used conjunctively.

a) 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 non-retroactivity of the law, the principle of legality or the principle of the protection of legitimate expectations⁶⁷ 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.

i. Legitimate expectations

Case No. 2009-43-01 on Compliance of the First Part of Section 3 of State Pensions and State Allowance Disbursement in 2009

⁶⁶ See, for example, *Giudizio di legittimità costituzionale in via incidentale* in Italy (article 134 of the Italian Constitution); *Questions prioritaires de constitutionnalité* in France (article 61-1 of the French Constitution); *Exception d'inconstitutionnalité* (article 133 of the Constitution of Morocco).

⁶⁷ 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.

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>

ii. 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**Back-ground:**

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](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 judgment (only available in Bulgarian):
<http://dv.parliament.bg/DVWeb/broevelist.faces>

b) Non-discrimination and equality

The rights to non-discrimination and equality retain a very fundamental, intrinsic and instrumental value for the protection of ESC rights.⁶⁸ Indeed, the rights to non-discrimination and equality, as well as the right to the equal protection of the law are 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.

⁶⁸ *ICJ Justiciability Study*, pp. 54-61.

The following case-law examples illustrate how judicial bodies in various jurisdictions have heavily relied on the prohibition of discrimination and on equality provisions in their domestic law to protect ESC rights, and how they have sanctioned discriminatory laws and practices in relation to various other ESC rights, and in relation to various prohibited grounds for discrimination.⁶⁹

i. Cases concerning discrimination against persons with disabilities

	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, Rights:	Reasonableness; Non-discrimination and equal protection of the law; Human dignity; Negligence; Right to education; Persons with disabilities
Summary	This case concerned the rights of severely and profoundly intellectually disabled children in

⁶⁹ 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/>

Back-ground:

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 judgment 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>

ii. 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 Back- ground:	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>

iii. 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 de-

veloped 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) suspend-

ed 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>

iv. 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 include 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 fields of employment, social benefits and education.⁷⁰

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

⁷⁰ 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 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.

Back-ground:

Holding: This case is an appeal by John and Jane Doe, the parents of Susan Doe, of a summary judgment 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 dis-

continue 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>

Case:

v. Cases concerning discrimination against non-nationals/migrants

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 com-

plainant 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 requirement, 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. Bo-

khary 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

c) Reasonableness

"Reasonableness" is a standard of review often used by courts to make 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 particular law or practice at issue 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.⁷¹

⁷¹ "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 In-*

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.

i. Reasonableness in ESC rights litigation

In the area of ESC rights litigation, South African jurisprudence has played a particularly exemplary role, especially the ruling of the Constitutional Court of South Africa in the *Grootboom* case.⁷² 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 Court and of judicial and quasi-judicial bodies beyond South Africa when deciding on cases of positive obligations in the area of ESC rights.⁷³

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

ternational Covenant on Economic, Social and Cultural Rights, in *Human Rights Law Review* 11:2 (2011), pp. 275-327, at pp. 305-309.

⁷² 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.

⁷³ 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.

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.⁷⁴ 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 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;*

⁷⁴ 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-internacional-de-derechos-economicos-sociales-y-culturales-commentary-to-the-optional-protocol-on-economic-social-and-cultural-rights/>; and Brian Griffey, The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *supra* note 71.

- (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.”⁷⁵*

ii. Application of the reasonableness test and examples of variations in different jurisdictions

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

⁷⁵ 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.

measures to realize achievement if the right within available resources.⁷⁶

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 household.⁷⁷ Evidence suggested that the law had been enacted to prevent persons from alternative communes from applying for social assistance.

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 Back-ground:	Around 20,000 occupiers of the Joe Slovo informal settlement in Cape Town appealed an order for their eviction. The order had been 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 ? to

⁷⁶ *Lindiwe Mazibuko & Others v. City of Johannesburg & Others, Case CCT 39/09, [2009] ZACC 28*, Constitutional Court of South Africa (2009).

⁷⁷ *US Department of Agriculture v. Moreno*, 413 US 528 (1973).

provide? 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 judgment 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 constitutionality 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
Stand- ards, Rights:	Reasonableness; Rights to water and sanitation;
Summary Back- ground:	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:	<p>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].</p> <p>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</p>

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>

d) Proportionality

The test of proportionality requires that limitation or restriction of a human right obligation be 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 2006,⁷⁸ 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 proportionality as proportionality between the means selected and the goals sought, and reasonableness as reasonableness of means and ends.⁷⁹

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.

⁷⁸ For more information on this case, please refer to the *ICJ Justiciability Study*, p. 37.

⁷⁹ See the case summary below and ESCR-Net Caselaw Database, accessible at: <http://www.escr-net.org/node/364909>

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].

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”. 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>

e) 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, overall to the right to a fair trial, which is guaranteed in international human rights law.⁸⁰ Realization of the right to a fair trial requires that a set of specific rights be guaranteed in the course of proceedings and that no one will be deprived, in procedural terms, of the right to claim justice.⁸¹ In particular, the right to a fair trial includes, among other things, the guarantees of equality of arms and of non-discrimination between the parties to the proceedings.⁸²

At the domestic level, constitutional guarantees of due process of law and fair proceedings are important to the protection of ESC rights or at least elements of these rights.⁸³

⁸⁰ In particular, this right is guaranteed at article 14 of the International Covenant on Civil and Political Rights.

⁸¹ Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32 (2007), paras 2 and 9.

⁸² Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32 (2007), para. 8.

⁸³ 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.

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 Back- ground:	<p>In this case, the applicants sought a declaration 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.</p>
Holding:	<p>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].</p> <p>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</p>

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 fulfilling 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 people 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>

f) 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 in contexts in which these rights are not explicitly recognized 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 the right to 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:**

The case centers 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 rights to life, health and human dignity.

Holding:

The Court, in agreement with the impact assessment of the Act as outlined by the petitioner, 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 rights to life, human dignity and health as protected by the Constitution encompass 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 CESCR 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>

g) Minimum level of existence

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, the right to an adequate standard of living and the right to education.

Judgment 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 The issue at stake was whether the amount of cash benefits for asylum seekers was compat-

Back-ground:

ible 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 asy-

lum 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/lis20120718_1bvl001010en.html

4. Various types of remedies

As discussed in Chapter 1, Section I. 2 above, the right to an effective remedy is an integral part of international human rights law.⁸⁴ 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.

Remedies for ESC rights violations, as with any human rights violations, are aimed at achieving justice and repairing harm 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, 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.

a) 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.

⁸⁴ 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 at: <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations/>

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 international level, 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.⁸⁵

⁸⁵ 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 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.

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.⁸⁶ Common law jurisdictions will typically also have arrangements providing for immediate injunctive relief in respect of various situations. For instance in *Farai Mushoriwa v City of Harare HH 195-14*, the Zimbabwean High Court gave an order for interim relief in which the Respondent was interdicted from '*interfering whatsoever with, disrupting or terminating the Applicant's water supply without the authority of the Court*',⁸⁷ a violation which would have exposed the Applicant to an inhumane way of living.

b) 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.

⁸⁶ 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.

⁸⁷ *Farai Mushoriwa v. City of Harare*, High Court of Zimbabwe, Case HH 195-14/HC 4266/13, 30 April 2014, p. 7.

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 *Finch* case described below.⁸⁸ In this instance, the plaintiffs sought a clarification of a point of law through a declaratory order of the highest court of a US state, the Massachusetts 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.

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 Judicial Court of Massachusetts; United States of America
Standards, Rights:	Non-discrimination and equal protection of the law; Right to health; Right to social security; Migrants

⁸⁸ *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 at page 79 of this Guide.

**Summary
Back-
ground:**

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 to the judgment, 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 federal courts, including U.S.

Supreme Court, so this judgment stands as the final judgment on this aspect of the case.

Link to Full Case: http://masscases.com/cases/sjc/461/461mas_s232.html

Similarly, the petitioners sought a declaratory order concerning the constitutionality of both a law and an act in the light of article 137 of the Constitution in a case from 2013 decided by the Ugandan Constitutional Court, *Advocates for Natural Resources & 2 Ors v. Attorney General & Anor.*⁸⁹ 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 of a specific case, but through a general or abstract review of the Constitutionality of a law or of an administrative act or its compliance with a treaty provision.

The South African, Indian and Colombian courts offer interesting examples of requiring systemic remedies, ordering the authorities 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

⁸⁹ *Advocates for Natural Resources & 2 Ors v. Attorney General & Anor*, Constitutional Court of Uganda, Constitutional petition number 40 of 2013, [2013] UGCC 10 (2013).

starvation deaths, which occurred despite excess grain stocks in India; and a violation of the constitutional and reproductive rights of two women living 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.⁹⁰

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
Summary Background:	This case addressed separate petitions dealing with the violation of the constitutional and reproductive rights of two women living 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.

⁹⁰ 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).

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 court, in its judgment, 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. It emphasized that the Government had an obligation to cre-

ate 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].

In addition to ordering compensation to be paid to 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

5. Enforcing decisions

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. In general, practitioners should remem-

ber that social mobilization and the support of social movements in a case typically plays a crucial role in demanding enforcement of decisions.

a) Recourse in cases of non-compliance with judicial decisions

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.⁹¹ 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.⁹²

⁹¹ 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/>

⁹² 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

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 Background: 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

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 judgment 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 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.

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.

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>

b) 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.⁹³

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 galvanize the struggle of the victims with broader public opinion and to apply pressure on the authorities to implement decisions.

The work of the Treatment Action Campaign in South Africa for the monitoring of the implementation of the decision by the Constitutional Court in favour of the general provision in public hospitals and clinics of a treatment to avoid mother-to-child transmission of HIV is an interesting example of the importance of public mobilization.⁹⁴

Advocating for implementation of judgments of the Inter-American Court of Human Rights in the cases involving the

⁹³ *People's Union for Civil Liberties v. Union of India & Others (PUCL)*, Supreme Court of India, Petition (Civil) No. 196/2001 (2001).

⁹⁴ For information on the work of the Treatment Action Campaign, please visit: http://www.tac.org.za/about_us

Yakye Axa and the *Sawhoyamaxa* in Paraguay are further illustrations of this.⁹⁵

	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 19 th 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.

⁹⁵ 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>.

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 in 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 to ensure a dignified life, particularly when high risk, vulnerable groups that require priority protection were at stake [para. 162]. The Court ordered the State to identify and grant the traditional land to the community at no cost within 3 years [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 Sawhoyamaya 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 Sawhoyamaya 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 judgments issued by the inter-American Court in the cases of *Yakye Axa* and *Sawhoyamaxa* no progress was made toward the implementation of the judgments 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

Chapter 2: Applicable International Standards for the Promotion and Protection of ESC Rights in Zimbabwe

As noted, the 2013 Constitution of Zimbabwe Amendment (No.20) Act requires that “international law and all treaties and conventions to which Zimbabwe is party”⁹⁶ be taken into account in interpreting the rights and provisions of the Declaration of Rights.

It is thus fundamental that legal practitioners in the country are knowledgeable about and use the international standards relevant to the adjudication of ESC rights. **Chapter 3 of the present Guide elaborates on the relationship and correspondence between national and international standards.**

This chapter provides a detailed overview of relevant international standards for the protection of ESC rights in Zimbabwe. International standards in this context are to be understood as encompassing norms and enforcement or monitoring mechanisms at the global or UN level as well as at the regional and sub-regional levels.

I. Global standards and jurisprudence

Zimbabwe is party to a number of international human rights treaties adopted under the auspices of the UN. It is notable that the State has made no reservations to any of these treaties.

Zimbabwe is party to the following international human rights treaties adopted under the auspices of the UN:

⁹⁶ Paragraph 46, 2013 Constitution of Zimbabwe Amendment (No.20) Act.

- International Covenant on Economic, Social and Cultural Rights (ICESCR) - since 1991
- International Covenant on Civil and Political Rights (ICCPR) - since 1991
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) - since 1991
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) - since 1991
- Convention on the Rights of the Child (CRC) - since 1990
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict - since 2013
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography - since 2012
- Convention on the Rights of Persons with Disabilities (CRPD) - since 2013

Permitting individual complaints procedures:
Optional Protocol to the Convention on the Rights of Persons with Disabilities - since 2013

Zimbabwe is however, not a party to the following substantive instruments: the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, the Convention against Torture, the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

In addition, the State has not ratified or acceded to or made the necessary declarations to several instruments that allow for the UN monitoring bodies to receive and consider individual

communications and carry out inquiries (procedural instruments). The State has not ratified the necessary instruments to allow individual complaints under the ICESCR, the ICCPR, or the Convention on the Rights of the Child, nor has it made the declaration by which it would recognize the competence of the Committee on the Elimination of Racial Discrimination to receive individual communications, as foreseen under article 14 of the ICERD. In that regard, the only one of these procedural instruments to which Zimbabwe is a party is the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The State has also accepted the inquiry procedure under article 6 of this Optional Protocol.

International law standards beyond the International Covenant on Economic, Social and Cultural Rights

Many international law instruments beyond the human rights field will be relevant or influence their promotion and protection. This is true for general rule of law principles but also for standards such as those of international environmental or international intellectual property law. In addition, all human rights being intimately linked, instruments for the protection of civil and political rights or for the protection of workers' rights should also be taken into consideration and used, as appropriate, by legal practitioners in litigating ESC rights. In that regard, the ILO conventions and recommendations provide important standards and guidance for the protection of rights at work, including in areas such as safety and occupational health, trade unions, working time and wages.

Under the CEDAW following particularly relevant rights are guaranteed:

- The right to equal education between men and women ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training (article 10).
- The right to work and to have access to the same employment opportunities and remuneration (article 11).

- The right to protection of health and to safe working conditions, including the safeguarding of the function of reproduction (article 11).
- The right to social security and the right to paid leave (article 11).
- Right to access to health care services, including those related to family planning (article 12).
- Right to appropriate services in connection with pregnancy, and right to adequate nutrition during pregnancy and lactation (article 12).
- The right to family benefits without discrimination (article 13).
- The right to bank loans, mortgages and other forms of financial credit without discrimination (article 13).
- The right to participate in recreational activities, sports and all aspects of cultural life without discrimination (article 13).
- The right to benefit from rural development through the participation in the elaboration and implementation of development planning; through access to adequate health care facilities; through the benefit from social security programs; through training and education; the enjoyment of adequate living conditions in relation to housing, sanitation, electricity, and water supply, transport and communications (article 15).
- The right to enter marriage with free and full consent and to freely choose a spouse (article 16).
- The same rights and responsibilities during marriage and at its dissolution; and with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation (article 16)
- The right to marital autonomy in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration (article 16).

Relevant provisions of the CRC regarding ESC rights:

- The right for the child to have access to information and material from a diversity of sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health (article 17);
- The right of children whose parents work to benefit from child-care services and facilities (article 18);
- The right of children with mental or physical disabilities to enjoy a full and decent life, in conditions that ensure dignity and facilitate the child's active participation in the community (article 23);
- The right to special care for the disabled child as well as assistance that is appropriate to the child's condition and to the circumstances of the parents or others caring for the child (article 23);
- The right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (article 24);
- The right for every child to benefit from social security, including social insurance (article 26);
- The right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (article 27);
- The right to free compulsory education, and accessible higher education on the basis of capacity by appropriate means (article 28);
- The right of the child to rest and leisure, and to participate freely in cultural life and the arts (article 31).

Under the CRPD following particularly relevant rights are guaranteed:

- Equality of enjoyment of all human rights and fundamental freedoms by women and girls with disabilities (article 6);
- Equal rights for persons with disabilities to own or in-

herit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit (article 12);

- Right to equal access of persons with disabilities to an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live; and right to access general tertiary education, vocational training, adult education and lifelong learning without discrimination (article 24);
- Right of persons with disabilities to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability (article 25);
- Right of persons with disabilities to work, on an equal basis with others; including the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities (article 27);
- Equal right of persons with disabilities to an adequate standard of living for themselves and their families, and to social protection (article 28).

A concrete example of how other human rights standards can be relevant for practitioners involved or interested in ESC rights adjudication and that shows 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, summarized below.

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 each Decision: 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 Back- ground:	<p>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, Mavelita Lucila Interiano Amador and Mayra Amador Raymundo; and the boys Brayán 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 Children 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</p>

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 provide 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 resolutive, I].

In addition, the Court ordered the enforcement of various measures for 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 resolutive, 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/>

1. 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 key relevant international ESC rights standards with the aim of encouraging practitioners in Zimbabwe 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 Zimbabwe as will be detailed in Chapter 3, and helps to give content and meaning to the existing provisions that are relevant to ESC rights protection.

a) General State obligations stemming from international law

The nature and scope of State obligations in the area of ESC Rights have been clarified by international legal experts and by the interpretive work of the UN CESCR.

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 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 Extraterrito-

rial 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 beyond their borders. This document is accessible at:

<http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf>

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;⁹⁷
- Adopt targeted, effective and low-cost programmes to protect the most at risk, even in instances of limited resources.

As mentioned in Chapter 1 above, the work of the CESCR, among others, has largely contributed to “demystifying” ESC rights and challenging the perception that justiciability of 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

⁹⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 9, UN Doc. E/C.12/1998/24 (1998), 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.”

and exert their best efforts toward full realization, using the maximum of available resources and appealing to international cooperation and assistance when necessary.⁹⁸ States have also a negative obligation not to interfere with the enjoyment of ESC rights, and to take protective measures 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,⁹⁹ 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 sys-

⁹⁸ 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 disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.”

⁹⁹ 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.”

tems".¹⁰⁰ 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.¹⁰¹

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*.¹⁰² 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.¹⁰³ 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".¹⁰⁴

Obligations of immediate application are also expressed in the concept of the *minimum core content* of each of the ESC

¹⁰⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98, para. 5.

¹⁰¹ *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 society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."

¹⁰² *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.

¹⁰³ *Ibid.*, paras. 3 and 5-7.

¹⁰⁴ See, for instance, article 14 of the ICESCR.

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;
- 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”.¹⁰⁵ 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”.¹⁰⁶ 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.¹⁰⁷ States must not remain inactive and must not defer to another time the design and

¹⁰⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98, para. 9.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

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.¹⁰⁸

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.¹⁰⁹ 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.¹¹⁰ General Comment No. 4 on the right 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.”¹¹¹

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 im-

¹⁰⁸ *Ibid.*, para. 2.

¹⁰⁹ *Ibid.*

¹¹⁰ See Committee on Economic, Social and Cultural Rights, General Comments No. 3, *supra* note 98, para. 9 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 rights provided for in the Covenant and in the context of the full use of the maximum available resources.” See also Committee on Economic, Social and Cultural Rights, General Comment No. 13, UN Doc. E/C.12/1999/10 (1999), para. 45; General Comment No. 14, UN Doc. E/C.12/2000/4 (2000), para. 32; General Comment No. 15, UN Doc. E/C.12/2002/11 (2003), para. 19; No. 19, UN Doc. E/C.12/GC/19 (2008), para. 42.

¹¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 4, contained in UN Doc. E/1991/23 (1991), para. 11.

posed by the ICESCR.¹¹² There is in this regard a “strong presumption of impermissibility of any retrogressive measures” taken in relation to substantive right.¹¹³ 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.¹¹⁴ 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 are strictly necessary; and that there are no alternative or less restrictive measures available.¹¹⁵

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.¹¹⁶ Although

¹¹² See Chapter 2, Section I. 1. b) 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/>

¹¹³ Committee on Economic, Social and Cultural Rights, General Comments No. 13, *supra* note 110, para. 45; No. 14, *supra* note 110, para. 32; No. 15, *supra* note 110, para. 19; and No. 19, *supra* note 110, para. 42.

¹¹⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98, 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.”

¹¹⁵ *Ibid.*, para. 9.

¹¹⁶ See generally Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98; and Magdalena Sepúlveda, *The Nature of the*

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.¹¹⁷

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.

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."*¹¹⁸

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 other rights, for example in General Comment 13

Obligations Under the International Covenant on Economic, Social and Cultural Rights, Intersentia, 2003, pp. 25-75.

¹¹⁷ 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 in particular the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *supra* note 112, para. 8.

¹¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98, para. 10.

on the right to education and in General Comment 15 on the right to water.¹¹⁹

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”.*¹²⁰

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.¹²¹

¹¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 110, para. 57; Committee on Economic, Social and Cultural Rights, General Comment No. 15, *supra* note 110, para. 37.

¹²⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra* note 98, para. 8.

¹²¹ *ICJ Justiciability Study*, p. 25. See also Chapter 5 of the ICJ Practitioners Guide No.8.

Right and article of the ICESCR	Core content and General Comment of the UN CESCR
Right to work / article 6	<p><u>GC 18</u></p> <ul style="list-style-type: none"> • 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	<p><u>GC 19</u></p> <ul style="list-style-type: none"> • 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 sanitation, foodstuffs, and the most basic forms of education.
Right to an adequate housing /article 11	<p><u>GC 4 and 7</u></p> <ul style="list-style-type: none"> • 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	<p><u>GC 12</u></p> <ul style="list-style-type: none"> • Right of all 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	<p><u>GC 15</u></p> <ul style="list-style-type: none"> • 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	<p><u>GC 14</u></p> <ul style="list-style-type: none"> • 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	<p><u>GC 13</u></p> <ul style="list-style-type: none"> • 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 resulting from one's scientific, literary or artistic production / article 15	<p><u>GC 17</u></p> <ul style="list-style-type: none"> • Effective protection to all of the moral and material interests of authors, as the creators of their scientific, literary and artistic productions.
Right to take part in cultural life / article 15	<p><u>GC 21</u></p> <ul style="list-style-type: none"> • 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;

	<ul style="list-style-type: none"> • 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.
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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 provisions 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.¹²²

Practitioners at the national level have extensively used anti-discrimination and equality laws and frameworks to defend ESC rights.¹²³

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)¹²⁴ of

¹²² 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.

¹²³ Some illustrative cases in which protection against discrimination has been used to protect ESC rights can be found in the caselaw database of the online version of the ICJ Practitioners Guide No. 8 at: <http://www.icj.org/advanced-search-for-escr-litigations/>; more cases can be found in the ESCR-Net caselaw database at: <http://www.escr-net.org/caselaw>

¹²⁴ 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 Covenant 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.¹²⁵

In General Comment No. 20,¹²⁶ 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 expressly prohibited grounds in the ICESCR, the CESCR has 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.¹²⁷

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

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

¹²⁵ 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.

¹²⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20 (2009).

¹²⁷ *Ibid.*, paras. 27-35.

*conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination...*¹²⁸

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 CEDAW. The CEDAW requires States to take a wide range of targeted measures to address and prevent discrimination against women.¹²⁹ 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,¹³⁰ employment,¹³¹ education¹³² and family and marital relations.¹³³ The approach of the CESCR, as laid down in the General Comment 20, is thus consonant with the provisions of the CEDAW in its article 4 concerning temporary special measures to achieve *de facto* equality.¹³⁴

¹²⁸ *Ibid.*, para. 9.

¹²⁹ Article 2 of the CEDAW. 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).

¹³⁰ Article 12 of the CEDAW. 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).

¹³¹ Article 11 of the CEDAW.

¹³² Article 10 of the CEDAW.

¹³³ Article 16 of the CEDAW. 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).

¹³⁴ Article 4(1) of the CEDAW. 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).

Right and article of the CEDAW	Core Content and General Comment of the CEDAW
<p>Right to equal education between men and women / Article 10</p>	<ul style="list-style-type: none"> • Same conditions for career and access to studies, and for the achievement of diplomas in educational establishments of all categories. • Encouragement of coeducation to eliminate any stereotyped concept of the roles of men and women. • Same opportunities to benefit from scholarships and other study grants, and to have access to continuing education. • Reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely.
<p>Obligation for States Parties to take appropriate measures to eliminate discrimination against women in the field of health, access to health care services, including those related to family planning / Article 12</p>	<ul style="list-style-type: none"> • Protection of girls, adolescents, and adult women. • Respect, protect and fulfil women's rights to health care. • Ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action • States parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health au-

	<p>thorities, because they are unmarried or because they are women.</p> <ul style="list-style-type: none">• Enactment and effective enforcement of laws and the formulation of policies, including health care protocols and hospital procedures to address violence against women and abuse of girl children and the provision of appropriate health services;• Gender-sensitive training to enable health care workers to detect and manage the health consequences of gender-based violence;• Fair and protective procedures for hearing complaints and imposing appropriate sanctions on health care professionals guilty of sexual abuse of women patients;• Enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children.• Right to sexual health information, education and services for all women and girls, including those who have been trafficked, including those who have been trafficked, even if they are not legally resident in the country. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed
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	<p>programmes that respect their rights to privacy and confidentiality.</p> <ul style="list-style-type: none">• Adequate protection and health services, including trauma treatment and counseling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict and women refugees.• Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.
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As far as the special measures are concerned, it is also important to note that the ICERD also prescribes States parties to take such temporary measures¹³⁵ when they are necessary to guarantee the equal enjoyment of all rights, including ESC rights,¹³⁶ to groups that are disadvantaged on the grounds of their race, colour, descent, nationality or ethnic origin.

In addition to the non-discrimination standards agreed upon by the States parties to the ICESCR, the CEDAW and the ICERD, the CRC and the CRPD also prescribe standards and specific obligations of States in respect of non-discrimination and equal protection. With regard to the rights of the child, the CRC requires that:

¹³⁵ 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.

¹³⁶ Article 5 of the ICERD.

*"[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."*¹³⁷

As far as the CRPD 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.¹³⁸ Article 2 of the CRPD defines "reasonable accommodation" as being the "necessary and appropriate modification and adjustments not imposing 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".¹³⁹

b) Specific obligations stemming from international law

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

¹³⁷ Article 3 (1) of the CRC.

¹³⁸ 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."

¹³⁹ Article 2 of the CRPD.

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.¹⁴⁰

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.

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.

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.

¹⁴⁰ 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 112; 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, UN Doc. E/C.12/1999/5 (1999), para. 15; No. 14, *supra* note 110, paras. 34-37; No. 19, *supra* note 110, para. 43.

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.

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.¹⁴¹ 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 educational services, potentially pollutant industries or private food and water suppliers.¹⁴²
- 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.

¹⁴¹ 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).

¹⁴² Guideline 15 (d) of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997), *supra* note 112.

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.¹⁴³

iii. The obligation to fulfil

An obligation to fulfil requires a State to take legislative, administrative, budgetary, judicial and other measures towards the full realization of rights, including by means of international assistance and cooperation. It can involve obligations to facilitate the access to goods and services necessary for the enjoyment of rights and relevant information; obligations to promote the enjoyment of rights, including through educational campaigns; and obligations to provide directly for the goods and services necessary for the enjoyment of the rights such as in the case of food aid for example, when individuals are not in

¹⁴³ 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.

a position to provide for themselves for reasons beyond their control.

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.¹⁴⁴ 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 marginalized groups.

¹⁴⁴ See Chapter 2, Section I. 2.

The obligation to fulfil can provide protection against:

- 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.¹⁴⁵

c) 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 and adoption in 2011 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights,¹⁴⁶ with a view to addressing these di-

¹⁴⁵ 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.

¹⁴⁶ 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/>.

mensions 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 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.

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;
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 extra-territorially, in accordance with international law.”¹⁴⁷

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.¹⁴⁸ States have both negative and positive ETOs. They must not harm ESC rights of people living in another State; they must protect people from harm by third parties that they regulate, control or are in a position to influence; and they must contribute to fulfilling 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

¹⁴⁷ Principle 9 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (emphasis added).

¹⁴⁸ Principles 11 and 12 of the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

international human rights law.¹⁴⁹ 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.

2. Violations of ESC rights under international law

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,

¹⁴⁹ 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 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_d_e_lhomme_0.pdf, para. 63.

whether through act or omission, has interfered 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.

a) 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.¹⁵⁰

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,¹⁵¹ and more often review legislation

¹⁵⁰ *ICJ Justiciability Study*, pp. 16 and 17.

¹⁵¹ See for instance Decision 53-2005/55-2005 of February 2013 of the Constitutional Chamber of the Supreme Court in El Salvador concerning a 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 of the Constitutional Chamber of the Supreme Court in El Salvador. In the deci-

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,¹⁵² illustrate 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,¹⁵³ 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.

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.

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

sion, 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.

¹⁵² *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).

¹⁵³ *ICJ Justiciability Study*, pp. 40 and 41.

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.¹⁵⁴ 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 useful to consult these resource documents for comparative purposes, especially looking at countries with a similar legal tradition.

b) 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.¹⁵⁵ 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.¹⁵⁶

¹⁵⁴ 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>

¹⁵⁵ 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.*”

¹⁵⁶ See Committee on Economic, Social and Cultural Rights, General Comment No. 4, *supra* note 111; and General Comment No. 7, *supra* note 155.

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 judgments 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. Beyond forced evictions, failures by States to respect the right to adequate housing can occur when States 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. Interestingly the Zimbabwean High Court has set a positive precedent on this issue to the effect that the courts will not easily accept arguments of public interest, town planning and/or general welfare in cases of forcible evictions. The courts have interpreted section 74 of the Constitution of Zimbabwe as strictly requiring the State or any other relevant party to obtain court permission first before they can conduct any evictions.¹⁵⁷ Public interest, town planning, common good or general welfare or any such argument does not therefore replace the procedural requirement to obtain court permission.

¹⁵⁷ See Mathonsi J's ruling on *Peter Makani and Others v Epworth Local Board and Others* HH 550-14.

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.¹⁵⁸

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.

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 prin-

¹⁵⁸ 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).

ciple 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.¹⁵⁹

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"¹⁶⁰
- "*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 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.*"¹⁶¹

¹⁵⁹ *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.

¹⁶⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 21, UN Doc. E/C.12/GC/21 (2009), para. 62.

¹⁶¹ *Ibid.*, para. 49.

iii. Right to education

- "closing private schools"¹⁶²
- *"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]."*¹⁶³

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."*¹⁶⁴

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 incompatible with pre-existing domestic or international legal obligations in relation to the right to health."*¹⁶⁵

¹⁶² Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 110, para. 50.

¹⁶³ Committee on Economic, Social and Cultural Rights, General Comment No. 13, *supra* note 110, para. 59.

¹⁶⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 12, *supra* note 140, para. 19.

¹⁶⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 14, *supra* note 110, para. 48.

- *"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."*¹⁶⁶

vii. 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"*¹⁶⁷
- *"formal repeal or unjustifiable suspension of legislation protecting the moral and material interests resulting from one's scientific, literary and artistic productions."*¹⁶⁸

viii. Right to social security

- *"engaging in any practice or activity that, for example, denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; arbitrarily or unreasonably interferes with insti-*

¹⁶⁶ *Ibid.*, para. 50.

¹⁶⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 17, UN Doc. E/C.12/GC/17 (2005), para. 30.

¹⁶⁸ *Ibid.*, para. 42.

tutions that have been established by individuals or corporate bodies to provide social security."¹⁶⁹

- *"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."*¹⁷⁰

ix. Right to water

- *"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."*¹⁷¹
- *"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."*¹⁷²

¹⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 19, *supra* note 110, para. 44.

¹⁷⁰ *Ibid.*, para. 64.

¹⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 15, *supra* note 110, para. 21.

¹⁷² *Ibid.*, para. 42.

x. 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"*¹⁷³
- *"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."*¹⁷⁴

c) Other features of violations

As this Guide has 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 the right to health constitute a good illustration of this. In an

¹⁷³ Committee on Economic, Social and Cultural Rights, General Comment No. 18, UN Doc. E/C.12/GC/18 (2006), para. 23.

¹⁷⁴ *Ibid.*, para. 32.

extensive body of case law, the Court has notably ordered the provision of specific treatments and thus challenged the coverage of the compulsory health plan, which de facto resulted in changes in rules and laws of the health care system.¹⁷⁵ 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.¹⁷⁶ 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 timelier 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

¹⁷⁵ 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.

¹⁷⁶ 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.

of starvation as a method of warfare, enforced sterilization or forced labour and sexual slavery.¹⁷⁷

II. Regional standards and jurisprudence

At the regional level, the human rights protection systems offer various opportunities, particularly in Africa, the Americas and Europe.

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, as elaborated on in the sub-

¹⁷⁷ 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]: Deliberate 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 155, paras. 7 and 13 (on forced evictions in armed conflicts); Committee on Economic, Social and Cultural Rights, General Comment No. 14, *supra* note 110, 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.

sequent section.¹⁷⁸ This is particularly true for practitioners in Zimbabwe as the State is a member of the African Union and can use the African Commission of Human and Peoples' Rights to enforce ESC rights.

Zimbabwe is party to the following African human rights instruments that include ESC rights:

- African Charter on Human and Peoples' Rights - since 1986
- African Charter on the Rights and Welfare of the Child – since 1995
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa – since 2008

1. The African Charter on Human and Peoples' Rights

The African Charter of Human and Peoples' Rights¹⁷⁹ (ACHPR) is an international human rights instrument that entered into force in 1986 and currently has 53 States parties (all African States except South Sudan), including Zimbabwe. The ACHPR is placed within the founding principles of the African Charter of the Organization of African Unity (now the African Union) that embeds fundamental objectives of "freedom, equality, justice and dignity"¹⁸⁰ and reaffirms the indivisibility and universality of all human rights: civil, cultural, economic, political and social.¹⁸¹ It further entrenches the duty to eliminate all forms of discrimination including based on race, ethnic group,

¹⁷⁸ See for example the case of *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002).

¹⁷⁹ African Charter of Human and Peoples' Rights (Banjul Charter) - (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986).

¹⁸⁰ Preamble African Charter of Human and Peoples' Rights.

¹⁸¹ Preamble African Charter of Human and Peoples' Rights.

color, sex, language, religion or political opinions.¹⁸² It finally reaffirms the adherence of African States to the principles of human rights contained in instruments adopted under the auspices of the United Nations.¹⁸³

In addition to these founding principles, the ACHPR guarantees specific ESC rights, which includes:

- the right to property that can be only limited by the law and for public need and the general interest (article 14);
- the right to work under equitable and satisfactory conditions and the right to equal pay for equal work (article 15);
- the right to enjoy the best attainable state of physical and mental health (article 16);
- the right to education (article 17);
- the right to take part in the cultural life of one's community (article 17);
- the right to the protection of the family (article 18).

Among the other relevant provisions for ESC rights, articles 20 and 21 entails important provisions for collective rights and respectively guarantee the right to self-determination of peoples and the right to freely dispose of their wealth and natural resources. Similarly, article 24 guarantees the right of all peoples to a general satisfactory environment favorable to their development.

Article 26 enshrines a specific the guarantee of the independence of the courts requires remedies in cases of violations of the rights under the ACHPR, and establishes the duty of States parties "to guarantee ... the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights...".

¹⁸² Preamble African Charter of Human and Peoples' Rights.

¹⁸³ Preamble African Charter of Human and Peoples' Rights.

Finally, the ACHPR provides for the establishment of the African Commission on Human and Peoples' Rights (ACnHPR), mandated to promote human rights and ensure their protection in Africa including through monitoring of the implementation of the ACHPR by States Parties and the examination of communications.¹⁸⁴ The treaty monitoring and communications mechanisms are described in more depth in section III below.

Through its jurisprudence, the ACnHPR has read into the Charter rights from the ICESCR that were not explicitly mentioned, in line with international law. It has also greatly contributed to the development of the understanding of State obligations of ESC rights. Indeed, in *SERAC and CESR v. Nigeria*, the ACnHPR 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".¹⁸⁵

The ACnHPR detailed the content and implications of the duty of the State to respect the right, and 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. These actions constitute massive violations of the right

¹⁸⁴ Articles 30-62 of the African Charter of Human and Peoples' Rights.

¹⁸⁵ *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, para. 54.

to shelter, in violation of Articles 14, 16 and 18(1) of the African Charter."¹⁸⁶

2. An expanding corpus of African human rights norms – Additional protections for women and children

The standards enshrined in the ACHPR have been complemented by the adoption of protocols extending specific guarantees and protections to specific groups and individuals.

a) The Maputo Protocol – The rights of women in Africa

In particular, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted in 2003 in Maputo. This treaty, known as the Maputo Protocol, supplements the Charter in responding to specific needs and protections that women have and require in order to equally enjoy their human rights. There are a significant number of economic, social and cultural rights enshrined in the protocol.

In the subsequent paragraphs, the examples illustrate the approach of the Protocol and the mix of negative and positive obligations that States ought to comply with to ensure equal enjoyment of the African Charter's rights by women and girls.

Article 12 of the Maputo Protocol guarantees the right to education and training for women and girls. It not only requires States to guarantee equal opportunities and access to education and training for girls and women; but it also requires States to take measures to combat culturally or historically entrenched discriminatory conduct, such as measures to eliminate stereotypes from schoolbooks, syllabuses and the media and to integrate education about women's and other human rights at all levels of education including teachers' training.

¹⁸⁶ *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96, 13-27 October 2001, paras 61 and 62.

Article 13 of the Maputo Protocol concerns economic and social welfare rights of women and girls. It includes provisions in various areas including those related to equal remuneration for jobs of equal value for women and men; the prohibition of gender discrimination in taxation laws; but also to the establishment of a system of social protection for women workers in the informal sector.

Article 14 elucidates specific elements of the right to health of women, especially concerning sexual and reproductive health, and which includes the rights to control their fertility and to decisions and education on family planning. These rights require States, *inter alia*, to take all appropriate measures to ensure effective access to health and nutrition services including information, but also to authorize medical abortion in certain (prescribed) circumstances.

Article 15 reiterates the right to adequate food that shall be enjoyed equally by women. It also enshrines the obligations of States to provide women with resources necessary for food production and rural livelihoods such as water and land.

Article 16 guarantees the right of women to housing, no matter what their marital status is. This is particularly important since customary laws regulating inheritance and division of property in cases of divorce or separation still prevail in many African countries. These provisions are typically to the detriment of women. This article is to be read in conjunction with article 21 on the right to inheritance that recognizes rights of women to inherit an equitable share of the property of their husbands and parents. It also specifies that widows have the right to stay in the marital house after the death of their husband.

Article 17 recognizes the rights of women to live in a positive cultural context and to participate in the design of cultural policies. This can play a crucial role in the elimination of discriminatory cultural practices and stereotypes that prevent the equal enjoyment of human rights by women and girls.

Other provisions of the Maputo Protocol are of importance for practitioners litigating ESC rights include articles 22 to 24 that guarantee special protections to categories of women who are in situations of particular vulnerability such as elderly women, women with disabilities, or women heads of households.

Finally, article 25 is of general importance for the litigation of women's rights in Africa including of their ESC rights as it obliges States to:

"a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognised, have been violated; b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law."

In addition to the articles of the Maputo Protocol themselves, the ACnHPR has adopted two General Comments that interpret article 14 of the Maputo Protocol on the right to health of women, that should guide States in their realization of this right.

The first general comment¹⁸⁷ concerns the intersection of women's rights and HIV. In particular, it spells out the obligations of States and gives policy recommendations so that women can enjoy their rights under article 14 and more specifically their right to self-protection and to be protected from HIV and sexually transmitted infections, as well as women's right to information about their health and the health of their partner.

In its General Comment No. 2,¹⁸⁸ the ACnHPR elucidates other aspects of article 14 of the Maputo Protocol. It provides guid-

¹⁸⁷ General Comment No. 1 of the African Commission on Human And People's Rights, on article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at its 52nd Ordinary Session held from 9 to 22 October 2012.

¹⁸⁸ General Comment No. 2 of the African Commission on Human And People's Rights, on article 14 (1) (a), (b), (c) and (f) and article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the

ance to States as to legal and policy reforms and other measures to be taken to guarantee women's effective access to services, goods and information that are necessary for the realization of their sexual and reproductive rights. These measures include access to services for, as well as information and education on family planning, contraception and safe abortion.

b) The rights of African Children

Another African Union human rights treaty to which **Zimbabwe is a State party** is the 1990 African Charter on the Rights and Welfare of the Child (ACRWC).¹⁸⁹ Taking a similar approach to the one followed in the CRC, this treaty enshrines general principles as well as specific rights and protections that shall be afforded to children.

With regard to the general principles, the ACRWC reiterates the principles and obligations enshrined in the CRC, and in particular:

- the best interests of the child shall be given priority in all actions by persons and authorities, including in judicial and administrative proceedings, which includes the right of children to have their views heard and taken into account;
- parental care and protection which place responsibilities on parents or other caregivers to ensure the necessary conditions for the child's development and life in dignity, but also a corresponding obligation on States to assist parents and other caregivers in fulfilling their responsibilities, especially if they are in need of material assistance including regarding nutrition, health, housing or education.

Rights of Women in Africa at its 55th Ordinary Session held from 28 April – 12 May 2014.

¹⁸⁹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

In addition, the ACRWC guarantees the rights of children and spells out corresponding States obligations with regard to specific ESC rights including the rights to: education;¹⁹⁰ the protection against all forms of economic exploitation and any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development;¹⁹¹ and the right to enjoy the best attainable state of physical, mental and spiritual health.¹⁹²

3. Sub-regional norms – the Southern African Development Community's instruments

Zimbabwe is also a party to several sub-regional instruments developed under the auspices of the Southern African Development Community (SADC) that are in resonance with other international treaties.¹⁹³ These instruments include but are not limited to:

a) Protocol on Gender and Development

The goal of the SADC Protocol on Gender and Development, adopted on 17 August 2008 and ratified by Zimbabwe in June 2009, is the integration and the mainstreaming of gender issues into the SADC Programme of Action and Community Building initiatives, which is important to the sustainable development of the SADC region.

The Protocol aims to provide for the empowerment of women, to eliminate discrimination and achieve gender equality by encouraging and harmonizing the development and implementation of gender responsive legislation, policies and programmes and projects.

¹⁹⁰ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), article 11.

¹⁹¹ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), article 15.

¹⁹² African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), article 14.

¹⁹³ For more information, please visit: <http://www.sadc.int/themes/>

It also aims to set realistic, measurable targets, time frames and indicators for achieving gender equality and equity and to ensure the monitoring and evaluation of the progress made by Member States to reaching the targets and goals set out in the Protocol. To this end the Protocol clearly speaks to issues of constitutional and legal rights, governance, and education and training, productive resources and employment, gender-based violence, HIV/Aids and Conflict Resolution.

Objectives:

- Elimination of discrimination
- Harmonization of legislation and implementation of instruments like CEDAW
- Monitoring and evaluation of progress made to reach the goals set out

The protocol prescribes the adoption of measures of affirmative action: “parties shall put in place affirmative action measures with particular reference to women”. It addresses and requires States to take measures on multiple cross-cutting issues are: right of widows, sexual harassment, persons with disabilities, girl and boy child, governance, economic empowerment, social economic and cultural practices, HIV and AIDS and health.

b) Protocol on Education and Training

Member States acknowledge that whilst each Member State has its own policies for education and training and whilst cooperation and mutual assistance in education is desirable, this can be facilitated more effectively by the development of harmonized and eventually standardized policies regarding education and training.

The Protocol on Education and Training Development in SADC, adopted on 8 September 1997 and ratified by Zimbabwe on 31 September 2000, identifies the areas of cooperation as follows: basic education, intermediate education and training, higher education and training, research and development, life-

long education and publishing and library resources.

The Protocol further gives guidance on institutional arrangements for implementation of the Protocol as well as resources and scholarship fund assets.

Two main objectives of this Protocol are:

- Cooperation in education and training between SADC countries, including education for adults;
- Cooperation in research and development (article 8).

c) Protocol on Health

The SADC recognizes that close co-operation in the area of health is essential for the effective control of communicable and non-communicable diseases for addressing common concerns within the region.

To this end, SADC Member States signed the Protocol on Health on the 18th of August 1999 to coordinate regional efforts on epidemic preparedness, mapping prevention, control and where possible the eradication of communicable and non-communicable diseases. Education and training, efficient laboratory services and common strategies to address the health needs of women, children and vulnerable groups are discussed within the Protocol.

The Protocol, ratified by Zimbabwe on 14 August 2004, encourages the establishment of institutional mechanisms within the health sector of the region to effectively implement the Protocol.

In the area of health, practitioners should also note the Model Law on HIV in Southern Africa (the Model Law) that was adopted by the SADC on 24 November 2008.

The SADC first came up with the project of developing a Regional Model law on HIV in June 2007, in response to the legal inertia in sub-Saharan Africa regarding legislation ad-

dressing HIV. The project was fully realized by having the final document adopted by the Highest Policy Organ, the plenary Assembly.

The Model Law devotes several provisions to the protection of human rights. It pays specific attention to the often forgotten or neglected issues and groups, and integrates them into the legal response to HIV. It upholds human rights standards as provided in international human rights conventions at the global, regional and sub-regional levels.

The Model Law:

- Prescribes the prohibition of direct and indirect discrimination based on actual/perceived HIV status.
- Guarantees the protection of the right to privacy and confidentiality of people living with HIV.
- Provides for a non-limitative enumeration of vulnerable and marginalized groups: children, women and girls, sex workers, and injecting drug users, refugees, immigrants, prisoners, internally displaced persons, indigenous and mobile populations, men who have sex with men, lesbians, transgenders and bisexuals.
- Provides for specific services to members of vulnerable groups including access to HIV-related information and education.
- Requires State to sensitize communities to the danger of harmful cultural practices that contribute to HIV transmission.
- Rejects coercive approach to HIV, for instance by excluding compulsory HIV testing or disclosure of HIV status.

d) Charter of the Fundamental Social Rights in SADC

The overall objective of the Charter of the Fundamental Social Rights in SADC, adopted on 1 August 2003, is to facilitate through close and active consultations amongst social part-

ners, a spirit conducive to harmonious labour relations within the region.

The Charter promotes the formulation and harmonization of legal, economic and social policies and programmes, which contribute to the creation of productive employment and opportunities and generation of income in Member States. It further promotes labour policies, practices and measures which facilitate labour mobility in labour markets; enhanced industrial harmony and increased productivity.

The Charter provides a framework for regional cooperation in the collection and dissemination of labour market information, promotes the establishment and harmonization of social security standards and health and safety standards at workplaces across the sub-region. It also promotes the development of institutional capacities as well as vocational technical skills in the sub-region.

Most relevant articles for ESC rights include:

- Article 4: Freedom of association and collective bargaining
- Article 6: Equal treatment for men and women
- Article 7: Protection of children and young people
- Article 8: Elderly persons
- Article 9: Persons with disabilities
- Article 10: Social protection
- Article 11: Improvement of working and living conditions
- Article 12: Protection of health, safety and environment
- Article 13: Information, Consultation and Participation of workers
- Article 14: Employment and remuneration
- Article 15: Education and training

III. Global and regional mechanisms for the promotion and protection of ESC rights

Victims of violations of ESC rights and their counsel may have to consider bringing their cases for scrutiny before 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.

The African Regional and international human rights systems offer a variety of judicial and non-judicial mechanisms and procedures through which individuals may seek redress for violations of their rights by Zimbabwe.

1. UN mechanisms

Today, almost all UN human rights treaties benefit from an individual complaint or communication mechanism.¹⁹⁴

In addition to the procedures allowing individuals to bring cases to the attention of UN bodies acting in a quasi-judicial function, other UN mechanisms exist for monitoring States implementation of the treaties they are parties to or for guiding States' legal and policy efforts in general or with regard to specific situations.

a) Quasi-judicial bodies

As highlighted in Part I of the present chapter,¹⁹⁵ **Zimbabwe is currently a party** to only one of the UN instruments that create complaint procedures before the body mandated to monitor State parties' implementation of the particular treaty in cases of alleged violations of the rights under the particular

¹⁹⁴ 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>

¹⁹⁵ See list of UN instruments ratified by Zimbabwe at pp. 103-104.

treaties: the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD).

However, even though the State is not (yet) a party to the other instruments granting jurisdiction to the treaty monitoring body to consider individual complaints against the State, legal practitioners in Zimbabwe may usefully benefit from knowing about these procedures and referring to the jurisprudence that they have generated. They are therefore described in the subsequent sections.

i. OP - CRPD

Being in force for Zimbabwe and thus susceptible of immediate use by practitioners, the OP-CRPD provides for various procedures to denounce alleged violations of the rights contained in the treaty, the CRPD, to which it relates.

It is important to note that the CRPD enshrines a range of ESC rights of persons with disabilities. These include the right to education (article 24), to health (article 25), to work and employment (article 27), to adequate standard of living and social protection (article 28) and to participation in cultural life (article 30).

The OP-CRPD entails various procedures: an individual complaint procedure by which the Committee on the Rights of Persons with Disabilities can examine communications alleging violations of the Convention's rights by the State party; the possibility for the Committee on the Rights of Persons with Disabilities to urgently request the State to take interim measures in order to avoid irreparable harm to the alleged victims; and an inquiry procedure in cases of alleged grave and systematic violations of the Convention's rights.

Similarly to the procedures under other optional protocols to UN human rights treaties, in order to use the individual communications procedure under the OP-CRPD, practitioners will have to take into account and pay particular attention to the followings:

- Communications must concern any of the provisions of the CRPD;
- Communications may be brought by or on behalf of individuals and groups of individuals subject to the jurisdiction of the State;
- Some cases will **not** be deemed admissible in accordance with article 2 of the OP-ICRPD that reads:

"Article 2

The Committee shall consider a communication inadmissible when:

(a) The communication is anonymous;

(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention;

(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) All available domestic remedies have not been exhausted. This shall not be the rule where the application of the remedies is unreasonably prolonged or unlikely to bring effective relief;

(e) It is manifestly ill-founded or not sufficiently substantiated; or when

(f) 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."

Liliane Gröninger et al. v. Germany, Communication No. 2/2010

Year: 2014 (Date of Adoption of Views: 4 April, 2014)

**Forum,
Country:** United Nations Committee on the Rights of Persons with Disabilities; Germany

Standards, Rights: Non-discrimination and equality before the law; Right to decent work

Summary Back-ground: The author of the communication is Liliane Gröninger, who submitted it on behalf of her son, a German national with a disability. The author submits that disabled persons are not treated equally with persons without disabilities when they apply for jobs. She alleges that the provisions of the Social Law related to granting an integration subsidy are discriminatory, since they are only applicable to persons with disabilities, whose full working capacity may be restored within 36 months, that they create no rights for the disabled person, since the right to claim such subsidy belongs exclusively to the employer and that the manner in which discretion is applied in implementing these provisions by the Employment Agencies leads to further discrimination. She further submits that the integration subsidy is the only affirmative action available to assist her son for his inclusion in the labor market. The author hence claims that her son is a victim of violations by Germany of his rights under articles 3, 4, 8 and 27 (work and employment) of the CRPD. Although the author does not invoke it specifically, the communication appears also to raise issues under article 5 of the Convention.

Holding: The CRPD considered the communication admissible and found Germany in violation of the CRPD. In particular, the CRPD notes that article 27 of the Convention implies an obligation on the part of States parties to create an enabling and conducive environment for employment, including in the private sector. The Committee further observes that article 4, paragraph 1 (a) of the Convention imposes on

the State Party the general obligation to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the Convention related to work and employment. In the instant case, the Committee is of the view that the existing model for the provision of integration subsidies does not effectively promote the employment of persons with disabilities. The Committee finds in particular that the apparent difficulties faced by potential employers when trying to access the integration subsidy that they are entitled to for the employment of a person with disabilities affect the effectiveness of the integration subsidies scheme. The already mentioned administrative complexities put applicants in disadvantageous position and may in turn result in indirect discrimination. The Committee therefore considers that the integration subsidies scheme, as applied in the author's son's case, is not in accordance with the State party's obligations under article 27, paragraph 1 (h), read together with article 3, paragraphs a, b, c and e, article 4, paragraph 1(a) and article 5, paragraph 1 of the Convention [para. 6.2].

The Committee observes that article 27, paragraphs 1 (d) and (e) of the Convention enshrines the rights to benefit from appropriate measures of promotion of employment opportunities such as to have effective access to general placement services as well as assistance in finding and obtaining employment. The Committee is of the view that the measures taken by the responsible authorities of the State party to assist the integration of the author's son into the labor market did not meet the standard of the State party's obligations under articles 27, paragraphs 1 (d) and

(e), read together with article 3, paragraphs a, b, c and e, article 4, paragraphs 1 (a) and 1 (b) and article 5, paragraph 1 of the Convention. [para. 6.3].

The Committee is of the view that the State party has failed to fulfill its obligations under article 27, paragraphs 1 (d), (e) and (h), read together with article 3, paragraphs a, b, c and e, article 4, paragraphs 1 (a) and 1 (b) and article 5, paragraph 1 of the Convention.

Link to Full Case: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/D/2/2010&Lang=en

ii. Other Optional Protocols and complaint procedures

Among the other communications procedures that can 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 international protection of ESC rights.¹⁹⁶ The Optional Protocol creates a complaint mechanism as detailed below, as 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. As noted, Zimbabwe has yet to ratify this Optional Protocol, however, the jurisprudence of the CESCR under the Protocol provides authoritative interpretation of the obligations of states parties under the ICESCR that should guide litigants, as

¹⁹⁶ On the status of ratification of the human rights instruments under the auspices of the please visit: <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en>

well as the government and courts of Zimbabwe in the interpretation and implementation of ESC rights.

In addition to the OP-CRPD and OP-ICESCR, on 14 April 2014, the third Optional Protocol on a communication procedure for the Convention on the Rights of Child (OP-CRC) came into force, following its adoption on 19 December 2011.¹⁹⁷

As highlighted above in Section I of the present chapter, a significant number of provisions of the Convention on the Rights of the Child (CRC)¹⁹⁸ relate to ESC rights, and this mechanism will no doubt contribute to ensuring the right to a remedy and the development of jurisprudence with respect to persons whose ESC rights were violated at the time they were under 18 years of age.

Likewise, even though Zimbabwe is not (yet) a party to the Optional Protocol to CEDAW, the jurisprudence emerging from the CEDAW Committee under the OP-CEDAW will provide useful reference and guidance to Zimbabwean legal practitioners litigating ESC rights of women and girls, as well as to the government and domestic courts. The OP-CEDAW has been in force since 2000 and provides for the CEDAW Committee's considerations of individual communications, the imposition of interim measures to avoid irreparable harm, as well its carrying out of inquiries in cases of alleged grave and systematic violations of the rights enshrined in the Convention.

Finally, because of the indivisible nature of all human rights, views issued by the UN Human Rights Committee and by the UN Committee on the Elimination of Racial Discrimination,

¹⁹⁷ Optional Protocol to the 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.

¹⁹⁸ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), UN Doc. A/RES/44/25.

when they examine individual communications,¹⁹⁹ may also be of interest for practitioners litigating ESC rights in Zimbabwe.

Practitioners wishing to have detailed information on the complaints mechanisms established in Optional Protocols to the above-mentioned human rights treaties, including concerning the procedures created by the instruments and the modalities to lodge a complaint, will find useful links in the toolbox in Annex 1 and in particular can browse the UN database that collects all decisions by UN treaty-bodies at: <http://juris.ohchr.org/>

Practitioners can also respectively refer to the following civil society links and websites:

- **OP-CRPD**

<http://www.internationaldisabilityalliance.org/en/disability-rights-litigation>

- **OP-ICESCR**

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

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

¹⁹⁹ Communications can respectively be submitted to the UN Human Rights Committee for alleged violations of the ICCPR under the first Optional Protocol to the ICCPR (adopted 16 December 1966, entered into force 23 March 1976), UN Doc. A/RES/2200(XXI); and to the CERD under article 14 of the ICERD (adopted 21 December 1965, entered into force 4 January 1969), UN Doc. A/RES/2106(XX).

[http://www.geneva-academy.ch/docs/publications/Briefings and In briefs/The optional protocol In brief 2.pdf](http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20briefs/The%20optional%20protocol%20In%20brief%202.pdf)

See also the ESCR-Net manual, Claiming ESCR at the United Nations (2014), accessible at:

<http://www.escr-net.org/node/365482>

- **OP-CRC**

<http://ratifyop3crc.org/>

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

- **OP-CEDAW**

See the ESCR-Net resource on litigating women's ESC rights at the UN, at:

<http://www.escr-net.org/node/365157>

And in particular, on OP-CEDAW procedures:

<http://www.escr-net.org/sites/default/files/ESCR-NET-Manual-Booklet-3.pdf>

b) Other relevant mechanisms

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.

TO NOTE: As of September 2015 Zimbabwe was overdue in submitting a number of periodic reports to UN treaty-monitoring bodies about steps it had taken to implement its obligations under. Among the reports over due are reports to the Committee on Economic, Social and Cultural Rights (CESCR) on its implementation of the ICESCR. Since it became a treaty party to the ICESCR, the authorities in Zimbabwe have submitted only one report to the CESCR, in 1995. The CESCR examined this report and issued its concluding observations and recommendations on it in 1997. These may be accessed at:

[http://www.un.org/ga/search/view_doc.asp?symbol=E/C.12/1/Add.12\)](http://www.un.org/ga/search/view_doc.asp?symbol=E/C.12/1/Add.12)

Its second report to CESCR, which was due in 1998, had not yet been filed.

Among the UN treaty-bodies, not only the CESCR is of significance for ESC rights litigants and lawyers, but also other treaty monitoring bodies that have regularly addressed legal and policy issues that are relevant for ESC rights. Indeed, they have done so when the treaty which they monitor includes provisions on ESC rights (like the CRC or the CRPD) or in view of the connection between ESC rights and other rights that fall within the treaty that they are mandated to monitor.²⁰⁰

In addition to the opportunity to draw attention to a case in the context of the monitoring of policies and State reporting, international mechanisms offer various complaint and inquiry procedures. At the UN level, the special procedures, independ-

²⁰⁰ For information concerning these procedures, please refer to the toolbox in Annex 1.

ent experts (Special Rapporteurs and Working Groups), address important conceptual issues in their thematic reports that can be helpful to practitioners searching documentary and expert evidence. 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 allegation procedure is a kind of complaint procedures in 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 also the possibly of engaging the urgent appeal procedures, where the special procedure mandate holder will request the concerned State to take immediate preventive action to avoid irreparable harm to a victim or potential victim, much like a request for interim measures to an adjudicative body.²⁰¹

UN 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>

²⁰¹ 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>

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 or to 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>

The Universal Periodic Review (UPR), mechanism created by the UN Human Rights Council, is a regular peer-to-peer, inter-governmental procedure to assess the situation of human rights in countries. Even if the space for discussing and addressing ESC rights issues may be limited, NGOs can use the process to encourage States to discuss these issues and make relevant recommendations to address them.

Practitioners who wish to know more about the UPR process may refer to information compiled by the NGO UPR Info at: <http://www.upr-info.org/en>

2. African system

As already mentioned, Zimbabwe is party to the ACHRP. States compliance with this treaty and other AU human rights treaties is monitored by the African Commission on Human and Peoples' Rights (ACnHPR). In addition, the "Ouagadougou Protocol"²⁰² created a regional court, the African Court on Human and Peoples' Rights (ACtHPR) that is competent to consider complaints alleging that a state party to the ACHPR has violated one or more of its obligations to respect a right under the ACHPR or another relevant human rights treaty. The ACtHPR officially began operations in 2006 and delivered its first

²⁰² Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and People's Rights (adopted 9 June 1998, entered into force 25 January 2004). As of April 2015, there were 26 States parties to this Protocol.

judgment in 2009. However, while Zimbabwe signed the Protocol in 1998, it will not be competent to consider complaints about Zimbabwe unless or until Zimbabwe has ratified or acceded to the Protocol. Furthermore, only the ACnHRP, States, African Intergovernmental organizations and NGOs and individuals that have permission to do so by the Court may file cases with the court; alleged victims of human rights do not thus have automatic direct access to the court.

Practitioners in Zimbabwe will thus currently be able to consider bringing cases to the ACnHRP but not to the Court.

The African system offers a range of opportunities to obtain useful information and pronouncements on legal and policy issues underlying a case of violations of ESC rights.

a) Individual communications

Individuals and groups have the possibility to submit communications to the ACnHRP in cases of alleged violations of the rights guaranteed in the ACHR.

Similar to the procedures available with the UN bodies, the procedures at the ACnHRP allow for individual complaints under certain conditions of admissibility that are set at article 56 of the ACHPR:

"Article 56

Communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

- 1. Indicate their authors even if the latter requests anonymity,*
- 2. Are compatible with the Charter of the Organisation of African Unity²⁰³ or with the present Charter,*

²⁰³ The Organisation of the African Unity was replaced by the African Union (AU). The AU was launched in 2002 in South Africa, in implementation of the Sirte Declaration from 1999.

3. *Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity,*
4. *Are not based exclusively on news disseminated through the mass media,*
5. *Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,*
6. *Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter, and*
7. *Do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter."*

Practitioners wanting to know more can refer to the following links:

<http://www.achpr.org/communications/procedure/>,

<http://www.achpr.org/communications/guidelines/>

In addition, information on the jurisprudence of the ACnHPR can be found at:

<http://www.achpr.org/communications/>

<http://caselaw.ihrda.org/>

The ACnHPR has issued important decisions on cases of ESC rights violations, including the renowned *SERAC and CESR v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2002) summarized below.

SERAC & CESR v. Nigeria (155/96)

Year: 2002 (Date of Decision: 27 May, 2002)

Forum, Country:	African Commission on Human & People' Rights; Nigeria
Standards, Rights:	Duty to respect; Duty to protect; Right to health; Right to adequate housing; Right to adequate food; Right to life
Summary Back- ground:	<p>Complainants (represented by Social and Economic Rights Action Centre, SERAC and the Centre for Economic and Social Rights, CESR) alleged several violations of the ACHPR by Nigeria, among which violations of the right to life (art. 4), the right to housing (art. 14, 16, and 18(1)), the right to health (art. 16), the right to dispose of wealth and natural resources, and the right to a clean environment (art. 24), due to Nigeria endorsing and facilitating the operations of public and private oil companies in Ogoniland. Complainants alleged that the operations of oil Companies lead to the contamination of the Ogoni environment through the disposal of toxic wastes, and caused serious short-term and long-term health damage for the Ogoni population. The communication further alleged that Nigerian security forces engaged in attacks, killings, and burnings of Ogoni villages and homes to facilitate the exploitation of oil.</p>
Holding:	<p>The ACnHPR deemed the communication admissible based on article 50 of the ACHPR, according to which the ACnHPR can deal with a matter when all local remedies, "if they exist", have been exhausted. Since Nigeria ousted by decree the jurisdiction of the local courts to enforce the ACHPR, no adequate remedy exists for the complainants.</p> <p>The ACnHPR held that Nigeria violated the right to health and to a clean environment</p>

construed under article 16 and 24 of the ACHPR by contributing to contaminating air, water and soil, and by failing to protect the Ogoni population from the harm caused by NNCP Shell Consortium and other private oil companies.

The Commission reminded that article 24 contains several obligations for the States: “to take reasonable and other measures to prevent pollution and ecological degradation to promote conservation, and to secure an ecologically sustainable development and use of natural resources.” [para. 52]. Positive and negative obligations generally lie on the States to achieve the best attainable state of environmental and industrial hygiene enunciated in article 16(1) of the ACHPR, which must refrain from directly carrying out or tolerating any practice that violate the health and environment of citizens.

The ACnHPR acknowledged that Nigeria had the right to produce oil and to collect an income from its production to “fulfill the economic and social rights of Nigerians” [para. 54]. But the right to exploit the soil does not relieve Nigeria from the duty to respect its obligations under the Convention. Nigeria failed to take proper care to protect the rights of the Complainants under article 16 and 24 of the ACHPR, especially by ordering its security forces to attack, burn and destroy several Ogoni villages and homes.

The ACnHPR denounced a violation of article 21 of the ACHPR by Nigeria which failed to take appropriate measures to prevent harmful acts perpetrated by private parties, oil companies in particular, against the well-being of

the Ogoni population. The Court referred to the jurisprudence of the Inter-American Court of Human Rights (*Velásquez Rodríguez v. Honduras*) and the European Court of Human Rights (*X and Y v. Netherlands*), both requiring States to protect the individuals' enjoyment of their rights from interference by private parties (para 57).

The ACnHPR further held that read in conjunction, article 14, 16 and 18 (1) of the ACHPR provide a right to housing or shelter. The core components of the right to housing comprise the obligations for States not to "destroy the housing of its citizens and not to obstruct efforts by individuals and communities to rebuild lost homes." [para. 61]. Based on General Comment No. 4 (1991) of the CESCR, the ACnHPR also extended the right to housing to encompass the right to protection against "forced eviction." Nigeria violated the implicit right to housing under the ACHPR by destroying Ogoni houses and villages, and by ordering its security forces to kill citizens that attempted to rebuild their homes.

As to the right to food, which it considered to be "inseparably linked to the dignity of human beings and ... essential for the enjoyment and fulfilment of ... other rights" and implicitly guaranteed by the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22), Nigeria is required to protect and improve food sources and to ensure access to adequate food for all citizens [para. 65]. The ACnHPR held that Nigeria violated its duties under the right to food by destroying food sources through its security forces and State Oil Company, by allowing oil companies to de-

stroy food sources, and by creating obstacles for the Ogoni population to feed themselves.

The ACnHPR also found Nigeria in violation of the right to life (Art. 4) because of the widespread violations of the ACHPR committed by Nigeria and private actors. The ACnHPR held that the direct killings, the environmental degradations “to a level humanly unacceptable,” and the destruction of housing and farms “affected the life of the Ogoni Society as a whole.” [para. 67].

Link to Full Case: <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>

Another mechanism that considers individual complaints (or communications) is the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) which is mandated to monitor State Parties implementation of the African Charter on the Welfare of the Child, and of promoting and protecting the rights it guarantees, and interpret its provisions.²⁰⁴

As mentioned, Zimbabwe is a Party to this treaty and thus is subject to the complaints procedure under article 44.

In addition to considering such communications, the functions of ACERWC encompass monitoring implementation of the ACRWC through the examination of States parties’ reports; elaborating General Comments to guide States in better understanding and complying with their obligations; as well as carrying out investigative missions to States parties in cases of systematic or gross violations of children’s rights.

²⁰⁴ The African Charter on the Welfare of the Child establishes the Committee and, article 44 sets out, the procedure of communication.

Practitioners who want to obtain detailed information, including regarding the procedural requirements for the communication mechanism of the ACERWC, may refer to:

<http://acerwc.org/the-committees-work/>

<http://acerwc.org/the-committees-work/communications/>

b) Other mechanisms of the African Union

African Commission on Human and Peoples' Rights

In addition to considering complaints alleging violations by States Parties of the ACHPR or other human rights instruments by States Parties, the ACnHPR also has the function of reviewing periodic States reports on their performance in implementing the provisions of the ACHPR. Following the review, the ACnHPR issues concluding observations that may provide practitioners with useful pronouncements on a specific issue or country situation.

The ACnHPR also has the possibility to send delegations to specific member States with their consent. These country missions can have a fact-finding or promotional objectives.²⁰⁵

Furthermore, the ACnHPR can and has created special mechanisms that will be in charge of specific issues and processes, including the handling of communications.²⁰⁶

²⁰⁵ Missions reports can be found on the following page:
<http://www.achpr.org/mechanisms/>

²⁰⁶ The ACnHPR established a specific Working Group on Communications at its 50th Ordinary Session, held from 24 October to 5 November 2011, in compliance with its Rules of Procedure, and in order to facilitate the handling of communications received and prepare its decisions on admissibility and merits of those communications.

Among those mechanisms, the following are particularly relevant to the promotion and protection of ESC rights:

i. Working Groups

One of bodies created by the ACnHRP that is particularly relevant for ESC rights is the Working Group on Economic, Social and Cultural Rights (WG-ESCR).

Relying on the norms enshrined in the ACHRP and on the progressive jurisprudence of the ACnHRP, the WG-ESCR adopted and launched in 2011 a document that complements and details the ESC rights provisions contained in the Charter: the Principles and Guidelines on the Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.²⁰⁷ This *soft law* instrument, aims at giving guidance to States Parties on understanding and measures to be taken to comply with their obligations under the ACHRP in the area of ESC rights.

The WG-ESCR has also adopted the *Tunis reporting guidelines* on ESC rights²⁰⁸ to complement the general 1989 Guidelines for National Periodic Reports under the ACHPR; these reporting guidelines specify information expected to be set out about ESC rights in State reports to be filed by States parties to the ACHPR in accordance with article 62 of the Charter.

In addition to the WG-ESCR, the ACnHRP has established other bodies whose work is relevant to the promotion and protection

²⁰⁷ Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter, adopted by the ACnHRP Working Group on Economic, Social and Cultural Rights and publicly launched on 25 October 2011 at the ACnHRP 50th ordinary session held from 24 October – 7 November 2011.

²⁰⁸ State party reporting guidelines for economic, social and cultural rights in the African Charter on Human and Peoples' Rights (Tunis reporting guidelines), adopted by the ACnHRP Working Group on Economic, Social and Cultural Rights and publicly launched on 25 October 2011 at the ACnHRP 50th ordinary session held from 24 October – 7 November 2011.

of ESC rights. These include: the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV; the Working Group on Rights of Older Persons and People with Disabilities; the Working Group on Extractive Industries, Environment and Human Rights Violations; and the Working Group on Indigenous Populations/Communities in Africa.

ii. Special Rapporteurs

The mandates of Special Rapporteurs created by the ACnHPR may offer additional opportunities to obtain pronouncements on specific issues and country situations, as well as to raise awareness on a specific case. Special Rapporteurs are tasked with the promotion of the rights and provisions of the ACHPR relevant to their mandate, in particular through the elaboration of thematic studies and reports; the drafting of resolutions on important aspects of their mandate; visits and fact-finding missions to countries; and the collaboration with relevant governmental and non governmental actors at national and international levels.

Special Rapporteurs whose mandates are relevant to issues regarding ESC rights include, among others: the Special Rapporteur on human rights defenders; the Special Rapporteur on Rights of Women in Africa; and the Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons.

For the full list of ACnHPR special mechanisms (Working Groups and Special Rapporteurs), their composition and work, practitioners can consult:

<http://www.achpr.org/mechanisms/>

Chapter 3: ESC rights under the Constitution of Zimbabwe

As noted in this Guide, one of the key and new features of the Constitution of Zimbabwe Amendment (No. 20) of 2013 (hereafter the Constitution of Zimbabwe) is that, unlike its predecessor, it guarantees fully justiciable ESC rights under the Declaration of Rights.²⁰⁹

I. Constitutional provisions relevant for the protection of ESC rights

The new Constitution of Zimbabwe is made up of eighteen Chapters. Of these, two chapters are particularly relevant to ESC rights: Chapter 2 relating to “National Objectives” and Chapter 4 the “Declaration of Rights”.

1. National objectives

Chapter 2, the Constitution of Zimbabwe contains a list of National Objectives, whose primary function is to:

“guide the State and all its institutions and agencies of government at every level in formulating and implementing laws and policy decisions that will lead to the establishment, enhancement and promotion of a sustainable, just and democratic society in which people enjoy prosperous, happy and fulfilling lives.”²¹⁰

ESC rights are fundamental rights that protect the human dignity of individuals by way of securing and protecting the social, economic and cultural welfare and interests of human be-

²⁰⁹ Section 85 of the Constitution of Zimbabwe enshrines the justiciability and access to courts for rights enshrined in the Declaration of Rights set out in Chapter 4 of the Constitution of Zimbabwe Amendment (No.20) of 2013. Sections 45 and 46 of the Constitution provide for the application and interpretation by judicial and quasi-judicial bodies of all rights in the Declaration of Rights including ESC rights.

²¹⁰ See section 8 (1) of the Constitution of Zimbabwe.

ings.²¹¹ ESC rights are therefore at the core of the achievement of the constitutional objective set out under section 8 of the Constitution which is to establish “a sustainable, just and democratic society in which people enjoy prosperous, happy and fulfilling lives”.

Chapter 2 of the Constitution of Zimbabwe sets out guidelines that must be adhered to especially by Government when formulating and implementing laws, and making policy and other decisions. These policy objectives include areas such as employment creation,²¹² enhancing food security,²¹³ provision of free basic education,²¹⁴ provisions of access to adequate shelter,²¹⁵ provision of social welfare.²¹⁶ While the provisions in Chapter 2 of the Constitution are formulated as policy guidelines, rather than as fundamental (justiciable) ESC rights in and of themselves, the fact that these guidelines are constitutionally entrenched nevertheless means that citizens can use them to legally challenge the constitutionality of legislative, policy and other decisions taken by Government which are inconsistent with these constitutional policy guidelines. For example, a decision to massively shut down companies could be challenged on the basis of the constitutional policy guideline in section 14 (2), relating to employment creation arguing that this provision of the Constitution prohibits the Government from taking policy decisions that result in large scale loss of employment rather than creating jobs.

Section 14 (2) of the Constitution of Zimbabwe:
“At all times the State and all institutions and agencies of government at every level must ensure that appropriate and

²¹¹ J Mavedzenge and D Coltart. “A Constitutional Law Guide Towards Understanding Zimbabwe’s fundamental Socio-economic human Rights” (2014) 32.

²¹² See section 14 and section 24 of the Constitution of Zimbabwe.

²¹³ See section 15 of the Constitution of Zimbabwe

²¹⁴ See section 27 of the Constitution of Zimbabwe

²¹⁵ See section 28 of the Constitution of Zimbabwe

²¹⁶ See section 30 of the Constitution of Zimbabwe.

adequate measures are undertaken to create employment for all Zimbabweans, especially women and youths."

Therefore as a means of enforcing ESC rights, the provisions in Chapter 2 can be used to challenge the constitutional validity of decisions that go against certain constitutionally entrenched policy guidelines relating to ESC rights such as the provisions on shelter, free basic education.

In accordance with the Constitution itself, the provisions of Chapter 2 of the Constitution are to be taken into account in interpreting the scope and content of the fundamental rights that are enshrined in the Declaration of Rights set out in Chapter 4 of the Constitution. In particular, section 46 (1) (d) of the Constitution of Zimbabwe specifically requires that Chapter 2 of the Constitution to be duly considered when interpreting the provisions of the Declaration of Rights. Therefore when determining the scope and content of rights under the Declaration of Rights, such as the right to human dignity in circumstances of homeless persons, one should consider aspects of the right to shelter, taking into account section 28 of the Constitution which requires that the State take "reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter". Chapter 2 thus, among other things, is to be used as an interpretive aid for the Declaration of Rights.

2. The Declaration of Rights

Chapter 4 of the Constitution of Zimbabwe enshrines the Declaration of Rights.

The Declaration of Rights comprises of five parts of which Part 2 and Part 3 are dedicated to guaranteeing fundamental rights. Part 2 sets out civil and political, environmental as well

as ESC rights, while Part 3 elaborates certain rights enshrined under Part 2.²¹⁷

The following ESC rights are among those expressly enshrined under Part 2 of the Zimbabwean Constitution's Declaration of Rights:

- Freedom from forced or compulsory labour [section 55]
- The rights to choose language and to participate in cultural life [section 63]
- Labour rights [section 65]
- Freedom from arbitrary eviction [section 74]
- Right to education [section 75]
- Right to health care [section 76]
- Right to food and water [section 77]

Part 3 of the Declaration of Rights elaborates rights entitlements, including some ESC rights, of particular groups of people: women, children; elderly persons; persons with disabilities and veterans of the liberation struggle. Some of these rights may be interpreted as constituent elements of the rights set out under Part 2 of the Declaration of Rights but some of them may be considered as standalone rights. Among the rights enshrined in Part 3 of the Declaration of Rights are:

- Children's right to shelter [section 81(1) (f)]
- Children's right to nutrition [section 81 (1) (f)]
- Children's right to be protected from economic exploitation and child labour [section 81 (1) (e)]
- Elderly persons' right to receive reasonable care and assistance from their families and the State [section 82 (a)]
- Elderly persons' right to receive medical assistance from the State [section 82 (b)]

²¹⁷ See the introductory part of Part 3 under Chapter 4 of the Constitution of Zimbabwe.

- Disabled persons' right to be protected from all forms of exploitation [section 83 (c)]
- Disabled persons' right to access medical, psychological and functional treatment [section 83 (d)]
- Disabled persons' right to be provided with special facilities for their education [section 83 (e)]
- Disabled persons' right to receive state funded education and training [section 83 (f)]
- Rights of veterans of the liberation struggle to access basic healthcare [section 84(1)]

Although the new Constitution of Zimbabwe has indeed entrenched some ESC rights, some gaps remain, which must be filled, in order to meet Zimbabwe's obligations under international law, including the ICESCR.

To begin with, there are certain rights that Zimbabwe is obligated to respect, protect and fulfil under the ICESCR and the African Charter of Human and Peoples' Rights that are not expressly guaranteed under the Zimbabwean Declaration of Rights. These include the right to adequate housing for everyone and the right to work. To some degree, these rights can possibly be enforced through broad interpretations of other rights that are expressly guaranteed under the Declaration of Rights. This has been done in other jurisdictions where, for example, the right to human dignity and the right to life have been used to enforce certain elements of ESC rights that are not expressly provided for under the Declaration of Rights.²¹⁸

Furthermore, other rights guaranteed under the new Constitution of Zimbabwe are more limited in scope than the rights enshrined under international law, including the ICESCR and the

²¹⁸ For example in India, in the case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, the Indian Supreme Court broadly interpreted the right to life which is expressly protected under article 21 of the Constitution of India, to include that individuals can claim certain entitlements related to the right to health which is not expressly provided for under the country's Bill of Rights.

Convention on the Rights of the Child and the African Charter of Human and People's Rights. A case in point is section 81 (1) (f): it sets out the right to shelter, and pertains only to children. The scope of this right and its application appears more limited than the right to adequate housing under article 11 (1) of the ICESCR which is broader than just shelter and vests in everyone and not just children. Another example is that of the right to health. Whereas section 76 of the Constitution of Zimbabwe provides for the right to basic health care, article 16 of the African Charter of Human and Peoples' Rights provides for the right to the "best attainable state of physical and mental health". Another example is that of the right to receive social security. Whereas the ICESCR obliges State parties to guarantee the right of all to social security, the Constitution of Zimbabwe vests this right to elderly persons only.²¹⁹

Notwithstanding these gaps, the fact remains that the new Constitution of Zimbabwe represents progress compared to the previous Constitution, which only recognized ESC rights as "principles guiding state policy" and did not enumerate them as justiciable fundamental rights. Furthermore given the rights enshrined and interpretive requirements (set out in the Constitution itself, including in section 46) there is indeed scope, if not a mandate, for the courts to interpret existing provisions so as to provide some degree of protection of some of the "missing" rights and to expand the scope of rights which appear to be limited, in accordance with international law. This would be consistent with the view taken by the Constitutional Court of Zimbabwe in its ruling in the case of *Mawere v Registrar General and others* [2015] ZWCC 04, where it has taken a position that, to the extent allowed by the text or language used in formulating the right, courts must prefer a broad, flexible, value based and purposive interpretation of fundamental

²¹⁹ See section 82 of the Constitution of Zimbabwe that sets out this right and defines elderly persons as only such persons who are over the age of 70 years.

rights rather than pursuing a narrow, rigid and pedantic approach to interpreting these rights.²²⁰

II. Application of the ESC Rights in Zimbabwe

Broadly speaking, "*Application of the Declaration of Rights*" is a constitutional principle that answers questions such as to whom, for whom and against whom the fundamental rights and freedoms guaranteed under the Constitution's Declaration of Rights operate.²²¹ In relation to ESC rights adjudication in Zimbabwe, "*Application of the Declaration of Rights*" therefore relates to identification of the duty bearers and rights bearers of the ESC rights. However to understand this question, it is important to appreciate that ESC rights are part of the Declaration of Rights and are therefore regulated by the same 'application provisions' as those that regulate the application of civil and political rights. In that regard, section 45 of the Constitution of Zimbabwe is the primary reference point in understanding the application of ESC rights in Zimbabwe.

1. ESC rights holders in Zimbabwe

Section 45 (3) of the Constitution of Zimbabwe²²² is the primary reference point of the Constitution when deciding the question of whether one is a right holder or not. Broadly speaking, in accordance with this provision, all juristic persons as well as natural persons in Zimbabwe are entitled to the fundamental rights enshrined under the Declaration of Rights of the Constitution, to the extent to which the right in question can appropriately be extended to the person claiming it.²²³ The question

²²⁰ *Mawere v Registrar General & Others*, Constitutional Court of Zimbabwe, [2015] ZWCC 04, 26 June 2013, para. 20.

²²¹ Justice Alfred Mavedzenge and Douglas J Coltart "A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-economic and Cultural Human Rights" (2014), p. 37.

²²² It provides that 'Juristic persons as well as natural persons are entitled to the rights and freedoms set out in this Chapter to the extent that those rights and freedoms can appropriately be extended to them.

²²³ See section 45 (3) of the Constitution of Zimbabwe.

whether the right can appropriately be extended to the person claiming it, is resolved by considering the nature of the right, amongst other factors. By their nature, ESC rights enshrined under the Zimbabwean Declaration of Rights such as the right to education, language and culture, fair labour practices, water, shelter, health care, food right to receive social security are generally meant to secure, sustain and promote the dignity, social and economic welfare of human beings. It then would appear that such rights can only vest in natural persons and not juristic persons.

When resolving the question whether one is a right holder or not, the court must obviously consider in conjunction with section 45 (3) of the Constitution, the actual wording or formulation of the relevant provisions that define the scope and content of the right. The specific provisions setting out those rights often place qualifiers as to the categories of persons who should be considered as holders of the rights set out under the Declaration of Rights. In that regard, it is important to appreciate that certain ESC rights vest in certain categories of human beings in Zimbabwe. For instance, the right to a basic state funded education vests in every citizen of Zimbabwe and those that hold the legal status of permanent residence in Zimbabwe.²²⁴ This therefore means that, while section 45 (3) designates all human beings as holders of the rights enshrined under the Declaration of Rights, the specific provisions setting out the right to basic education limits the application of this right to citizens and permanent residents only, which is contrary to international standards applicable to Zimbabwe.²²⁵ More generally, the CESCR has clarified that the rights under the ICESCR, and in particular under the provision of non-discrimination in article 2 (2), “apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless

²²⁴ See section 75 (1) (a) of the Constitution of Zimbabwe.

²²⁵ In particular, article 13 (2) (a) of the ICESCR guarantees the right to primary education “available free to all”.

persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”²²⁶

In order to avoid that, those who fall outside of this category face challenges in claiming this right within Zimbabwe, it will be crucial that courts interpret the Constitution in compliance with international treaties ratified by the State. Moreover, in the absence of protection by national courts of such rights due to the limitation of their scope within the Constitution, individuals may have to seek recourse internationally in such cases.

Before bringing an action before the courts, one should check if the applicant falls under the category of individuals to whom the Constitution vests the right. In this regard, and in particular in cases where the Constitutional protections fall short of the protections guaranteed under international law, lawyers may consider reference to and reliance on international human rights standards and, for instance, to obtain support for their clients’ claims through expert opinions or amicus curiae by international legal practitioners.

The table below includes several of the ESC rights guaranteed under the Constitution of Zimbabwe and against each right, there is an explanation of the category of human beings to whom the Constitution expressly guarantees such right.

ESC Right	Location of the Right in the Constitution	Category of individuals in whom the right vests (right holders)
Right to language and culture	Section 63	Every individual e.g. persons from minority language groups who are being unfairly dis-

²²⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 20, UN Doc. E/C.12/GC/20 (2009), para. 30. See also, for instance, Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation No. 30 (2004).

		criminated or are threatened with such discrimination on the basis of language or cultural practice.
Freedom from arbitrary eviction	Section 74	Every individual who is threatened or is actually evicted without a court order that authorizes the eviction.
Right to shelter	Section 81 (1) (f)	Every individual who is under the age of 18 years. For example where a family has been displaced by a natural disaster, the children have the right to be provided with temporary housing by Government. It however remains to be seen whether the right to shelter for children in Zimbabwe will be interpreted as synonymous with the right to adequate housing.
Right to basic and further education	Section 75 (1) (a)	Every Zimbabwean citizen and every permanent resident of Zimbabwe.
Right to access basic health care services	Section 76 (1)	Every Zimbabwean citizen and every permanent resident of Zimbabwe who is unwell and is in need of basic medical treatment.

	Section 84 (1)	Veterans of the liberation struggle are entitled to access to basic health care.
Right to receive emergency medical treatment	Section 76 (3)	Every individual who is in need of emergency medical treatment (including those who have a road traffic accident and are in need of emergency medical treatment)
Right to sufficient food	Section 77 (b)	Every individual. For instance, this right may be invoked in circumstances where families have been affected by natural disasters such as floods, drought and are in need of food aid.
Right to safe, clean and potable water	Section 77 (a)	Every individual
Right to receive State funded financial support by way of social security and welfare	Section 82 (c)	Every individual who is over the age of 70 years
	Section 84 (1)	Veterans of the liberation struggle are entitled to suitable welfare including pensions
Right to fair and safe labour practices and standards and to be paid a fair and reasonable wage	Section 65 (1)	Every individual

2. Constitutional entrenchment of the principle of equality and non-discrimination

As a party to the ICESCR and other international human rights treaties, Zimbabwe has an obligation to ensure that the rights enshrined in these treaties are enjoyed by every person and fulfilled without discrimination.²²⁷ Yet, as mentioned in the previous section, the Constitution of Zimbabwe restricts the enjoyment of some of the rights it guarantees to certain groups, thus excluding others. Not only this contradicts Zimbabwe's international obligations, it does not accord with its own constitutional guarantee of equality and non-discrimination.

The principles of equality and non-discrimination also have been entrenched as guarantees under the new Constitution that enshrines the right to equality and non-discrimination within the Declaration of Rights,²²⁸ and includes equality as one of the foundational values of the Constitution.²²⁹

Section 56 (1) of the Constitution of Zimbabwe provides that "all persons are equal before the law and have the right to equal protection and benefit of the law".

When it comes to the fulfillment of the duties to respect, protect, promote and fulfill ESC rights and any other rights, the State and individuals have an obligation to uphold the principle of equality and therefore must not discriminate against any person.

Section 56 (2) of the Constitution enshrines the obligation to treat men and women equally in all spheres of life. This means, among other things, that in accordance with the Con-

²²⁷ See article 2 (2) of the International Covenant on Economic Social and Cultural Rights.

²²⁸ See section 56 of the Constitution of Zimbabwe.

²²⁹ See section 3 (1) (f) and (g) providing that Zimbabwe is founded on the values and principles that include "recognition of the equality of all human beings" and "gender equality".

stitution, both men and women have equal entitlement to have their ESC rights respected, protected, promoted and fulfilled. For example the State has a duty to ensure that both men and women benefit equally from Government programs that are aimed at fulfilling or protecting the ESC rights enshrined under the Constitution of Zimbabwe.

In the same vein, Government and others may not discriminate against anyone when fulfilling the duty to respect, protect, promote and fulfill ESC rights.

Under the Constitution of Zimbabwe, discrimination based on the non-exhaustive list of grounds set out in section 56 (3) is prohibited.²³⁰ However, not every differential treatment may be unlawful if it can be demonstrated that it is "fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom".²³¹ Given the wording of this provision, the courts will exercise some discretion in determining what constitutes discrimination and what constitutes acceptable differential treatment that is fair and reasonable in a democratic society. In exercising such discretion, as required under section 46 of the Constitution, the courts are obliged to consider international law and may consider decisions of superior courts in related foreign jurisdictions.

In that regard, the CESCR General Comment 20,²³² as detailed in Chapter 2, Section I. 1. a) iv), and the decision of the Constitutional Court of South Africa in the case of *City Council of Pretoria v Walker* 1998 (2) SA 363 paragraph 25 to 26 provide guidance as to how such discretion can be exercised and what differentiation in treatment may not amount to discrimination

²³⁰ These grounds include, among others, nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, sex, gender, marital status, age, pregnancy, disability, ethnic or social status, political affiliation, opinion, culture, custom and gender.

²³¹ See section 56 (5) of the Constitution of Zimbabwe.

²³² See Committee on Economic, Social and Cultural Rights, General Comment No. 20, *supra* note 226.

if it serves the achievement of substantive equality to the benefit of disadvantaged individuals and groups.²³³

3. Vertical application, horizontal application, indirect and direct application of the ESC rights in Zimbabwe

a) Vertical and horizontal application

From the foregoing discussion of ESC rights holders and duty bearers in Zimbabwe, it is apparently clear that ESC rights can be enforced both vertically and horizontally.²³⁴

Vertical application of ESC rights entails private individuals seeking the enforcement of certain ESC rights against the State. For example in *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195, the applicant was a private citizen who sought the court to intervene to protect his right, under section 77 of the Constitution, from arbitrary disconnection of his access to clean, safe and portable water, which he claimed had been violated by a local authority. *Peter Makani and others v Epworth Local Board and Others* HH 550-14 is another example of vertical application of the ESC rights as the applicants sought the enforcement of the right to freedom from arbitrary eviction against the State. It is interesting to note that both *Farai Mushoriwa v City of Harare* and *Peter Makani and others v Epworth Local Board and others*, are typical examples of vertical enforcement of ESC rights against local government authorities rather than the national government itself. In terms of section 5 of the Constitution of Zimbabwe, local government authorities are institutions of the State and therefore equally bound by duty under Section 44 to respect, protect, promote and fulfil the ESC rights enshrined under the Declaration of

²³³ This case was decided on the basis of the Interim Constitution of South Africa, whose right to equality provisions were formulated similarly to Zimbabwe's section 56 constitutional right to equality and non-discrimination.

²³⁴ See section 45 (2) of the Constitution of Zimbabwe.

Rights. Furthermore, it is important to appreciate that when State parties ratify and domesticate international instruments such as the ICESCR and the African Charter on Human and Peoples' rights, state institutions at all levels including local and regional Governments are bound by the State obligations under such instruments.²³⁵

The ESC rights guaranteed under the Constitution of Zimbabwe's Declaration of Rights can also apply horizontally. For instance, it is possible for a private individual to enforce his or her ESC right against another private individual. *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14 is an example of an action that sought horizontal enforcement of ESC rights, in so far as the court action was taken against Glory to Glory Housing Cooperative (the second Respondent), a private juristic person. Courts are also called upon to protect ESC rights horizontally when, in the context of a case before a court, a private person is seeking to ensure another private person respects an ESC right. For instance, in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Cooperative* 106/14, the applicant (Mavis Marange, a private person) sought an order of a court to compel the second respondent (Glory to Glory Housing Cooperative) to refrain from arbitrarily evicting the applicant from her home.

²³⁵ The ICCPR (article 50) and the ICESCR (article 28) both state that their provisions extend to all parts of federal States "without any limitations or exceptions." More generally, the collective responsibility of all organs of government under international law to ensure rights are respected, protected and fulfilled, has been affirmed notably in the Vienna Convention on the Law of Treaties, 1969, article 27; by the Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 4; and by the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. In the area of ESC rights, the Committee on Economic, Social and Cultural Rights has also affirmed that all relevant organs of the State should ensure that all individuals have access to their rights and, in its General Comment No. 9, UN Doc. E/C.12/GC/19, 4 February 2008, at para. 9 that: "all administrative authorities will take account of the requirements of the Covenant in their decision-making".

b) Direct and indirect enforcement

ESC rights can be directly enforced through the Direct Application of the Declaration of Rights. Direct Application of the Declaration of Rights happens when individuals directly invoke the provisions of the Declaration of Rights to enforce their rights.²³⁶

Usually fundamental rights provided for under the Declaration of Rights are enforced on the basis of the enabling legislation enacted to give effect to those rights. However as the High Court of Zimbabwe has held, until such a time that legislation is put in place or pre-existing legislation is aligned with the new Constitution, the provisions under the Declaration of Rights, protecting fundamental rights of individuals will be directly applied and enforced by the courts.²³⁷ Such application of the ESC rights is what is termed direct application of the Declaration of Rights.

ESC rights can also be applied indirectly, which means enforcing the rights by means of invoking the relevant provisions of the enabling legislation that is enacted to give effect to those constitutional ESC rights. However, where the enacted legislation sets standards that are below or otherwise inconsistent with the standards set by the Constitution, the court is allowed to bypass such legislation and directly apply the Declaration of Rights.²³⁸

²³⁶ Justice Alfred Mavedzenge and Douglas J Coltart "A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental socio-economic and cultural Human Rights" (2014), p. 39.

²³⁷ See the judgment of *Mathonsi J in Peter Makani and others v Epworth Local Board and others* HH 550-14.

²³⁸ See the judgment of *Bhunu J in Farai Mushoriwa v City of Harare* ZWHHC 195, at page 6, in which the learned Judge attacked the constitutionality of the by-laws in question and held that 'this Court having been conferred with the necessary jurisdiction to hear and determine this matter by the supreme law of the land, it cannot abdicate its function on account of an illegal municipal by law crafted by municipal authorities contrary to the Constitution'.

The indirect application of the Declaration of Rights brings to fore the importance of realignment of legislation in Zimbabwe with the 2013 Constitution. As mentioned earlier, the absence of realigned enabling legislation does not in any way preclude the enforcement of the ESC rights enshrined under the Declaration of Rights. However the presence of enabling legislation makes the job of interpreting and enforcing the provisions of the Declaration of Rights easier. This is because enabling legislation and regulations provide details which make the fundamental rights clearer in terms of the scope, content and how those rights are to be enforced. Because of the significance of enabling legislation in the implementation of the constitutionally guaranteed ESC rights, the current process of realignment of legislation that is taking place in Zimbabwe in order to give full effect to the new Constitution is a fundamental process for the effective protection of ESC rights in the country.

The table below indicates legislation relevant to the ESC rights enshrined under the new Constitution, as well as the absence of legislation concerning certain rights guaranteed under this new Constitution (the absence of legislation is explicitly mentioned in the table). It is important to emphasize that when it exists, the legislation was in most cases enacted prior to the new Constitution; it thus needs to be reviewed and, if necessary, aligned with the new Constitution in order to ensure that the new constitutionally guaranteed protections are adequately reflected.

ESC Constitutional Rights	Relevant Legislation
Right to Language and Culture	Education Act [Chapter 25:04]
Labour rights	Labour Act [Chapter 28:01]
Freedom from Arbitrary eviction	Currently no specific Legislation exists
Right to education	Education Act [Chapter 25:04].

Right to health care	Medical Services Act, 1998.
Right to food	Currently no specific Legislation exists
Right to water	Water Act [Chapter 20:24]
Children’s Right to shelter	Children’s Act [Chapter 5:06]
Right of elderly persons to receive social security	Social Welfare Assistance Act [Chapter 17:06]

III. Issues of standing: who can claim rights before the courts

In constitutional law discourse, “*enforcement of fundamental rights*” is a phrase that relates to how rights holders can claim or enforce their constitutionally guaranteed rights when they are faced with or when they are experiencing or have already suffered a violation of those rights.²³⁹

As alluded to in the introductory chapters of this Guide, a victim must have sufficient legal standing in order to bring an action before the court. Section 85 of the Constitution of Zimbabwe is the primary reference point when dealing with the question of legal standing for purposes of litigating any of the rights provided for under the Declaration of Rights.²⁴⁰ The Zimbabwean Declaration of Rights provides for five types of legal standing which ESC rights bearers can resort to in order to enforce their rights whenever the need arises: persons may act in their own interests; a person may act on behalf of another person; a person may act as a member or in the interests of a group or class of persons; a person may act in the public interest; or an association may act in the interests of its

²³⁹ Justice Alfred Mavedzenge and Douglas J Coltart “A Constitutional Law Guide Towards Understanding Zimbabwe’s Fundamental socio-economic and cultural Human Rights” (2014), p. 45.

²⁴⁰ ESC rights are also guaranteed as justiciable rights under the Declaration of Rights.

members. These types of legal standing (*locus standi*) are each discussed separately below.

1. Persons acting in their own interests

ESC rights holders can rely on section 85 (1) (a) of the Constitution to bring an action before the courts, in which they seek to enforce any of the ESC rights provided for under the Declaration of Rights.²⁴¹ The key requirement that must be satisfied by anyone who wishes to rely on this *locus standi* is that, he or she must allege that *their* right provided under the Declaration of Rights has been violated, or is under threat from an impending violation or the violation is currently underway. As clarified by the Constitutional Court of Zimbabwe in the ruling in *Jealous Mbizvo Mawarire v Robert Gabriel Mugabe* CCZ1/13 at page 8, the Court "...does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This [Constitutional] Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat."

Although this case concerned civil and political rights, this ruling by the Zimbabwean Constitutional Court is nonetheless very important for purposes of enforcement of ESC rights in the sense that it emphasizes the point that, one can approach the courts for an appropriate remedy simply on the basis of a legitimate or real suspicion that there is an impending plan to violate an ESC right. Being a ruling of the Constitutional Court, all other courts are bound by this position when they engage in the interpretation of the constitutional provisions on *locus standi*.²⁴² However, users of this Guide are reminded that the

²⁴¹ See *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195 and *Peter Makani and others v Epworth Local Board and Others* HH 550-14.

²⁴² The Constitutional Court is the final and apex court on constitutional matters and all other courts therefore follow its precedents.

"*de minimis non curat lex*"²⁴³ principle applies in Zimbabwe and due regard must therefore be taken when analysing the facts of the case.

It should also be emphasized to the users of this Guide that when intending to rely on section 85(1) (a) of the Constitution, the ESC right that is sought to be enforced must be provided for under the Declaration of Rights. Section 85 (1) (a) is not available as *locus standi* for rights that are not guaranteed under the Declaration of Rights. However in keeping with the spirit of purposive and broad constitutional interpretation or construction, individuals should be allowed to invoke section 85 *locus standi* to enforce *elements* of rights that, while not expressly guaranteed under the Declaration of Rights, can be read into fundamental rights that are expressly guaranteed under the Declaration of Rights.²⁴⁴

2. Person acting on behalf of another person

In the event of a violation or threat of violation of any of the ESC rights provided for under the Declaration of Rights, section 85 (1) (b) is also available as *locus standi* for persons that wish to act on behalf of other persons.

St Georges College Parents and Teachers Association v Minister of Education, Sport and Culture and Another [2004] ZWHHC 112 is a typical example of a Zimbabwean case in which this type of *locus standi* was used to bring an action for enforcement of an ESC right.²⁴⁵ In this case the association of parents and teachers acted on behalf of the children whose right to education had been violated by the Respondent's decision to close down their school.

²⁴³ A common law principle whereby judges will not sit in judgment of extremely minor transgressions of the law.

²⁴⁴ For the list of rights guaranteed in the new Constitution, please see Section I. 2. of the present chapter.

²⁴⁵ This case was however decided on the basis of the previous Constitution that recognized this *locus standi*.

Fundamentally the person who wishes to act on behalf of another person in terms of section 8(1) (b) must demonstrate that the action concerns an ESC right provided for under the Declaration of Rights and the person whose ESC right is violated cannot at present act for herself or himself. Furthermore the person on whose behalf the action is being brought must have sufficient interest in the remedies being sought and ordinarily, the person bringing the action must show proof that the person in whose interest she or he is acting has consented that such action be taken by her or him. However, where it is practically impossible to secure the consent, the person bringing the action should demonstrate that the circumstances are apparently clear that the person in whose interest the action is being brought would have consented to the action.²⁴⁶

3. Person acting as a member or in the interests of a group or class of persons

In the event of violations or threat of violation of any of the ESC rights belonging to a class or group of rights holders, any member or anyone acting in the interest of the concerned class of rights holders is entitled to invoke section 85 (1) (c) of the Constitution and bring an action before the courts. Section 85 (1) (c) of the Constitution of Zimbabwe therefore allows individuals to bring class actions to enforce the Declaration of Rights. A class action may be brought where a number of claimants all suffered losses due to a violation of their ESC right(s), and when it would be disproportionately expensive to individually seek constitutional redress.²⁴⁷

²⁴⁶ Justice Alfred Mavedzenge and Douglas J Coltart "A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental socio-economic and cultural Human Rights" (2014), p. 49.

²⁴⁷ *Permanent Secretary, Department of Welfare Eastern Cape and another v Ngxuza and others 1195 to 1996; Lubbe & Four Others v Cape Plc* and related appeals 27-7-2000 (House of Lords) on the hearing of an asbestos claim in England where the parent company was situated, rather than in South Africa where the damage was caused by a subsidiary of the parent company; also *Petroprops (Pty) Ltd v Barlow and Another 185* that one has to keep in mind the disadvantage that cost orders remain a great concern in class actions where individuals are drawn into litigation in respect of public interest issues.

Prior to the adoption of the new Constitution, class actions were brought before the courts under section 3 (1) of the Class Actions Act [Chapter 8:17].²⁴⁸ The Class Actions Act imposes a set of requirements and factors that the court must consider when deciding whether to grant leave to bring a class action.²⁴⁹ These requirements and factors are fully discussed by Sundura J in *Leslie Levente Petho v Minister of Home Affairs* [2002] ZWSC 80.

However it is important to clarify that class actions under the Class Actions Act on the one hand and the class actions envisaged under section 85 (1) (c) of the Constitution on the other hand may be two different things. The Class Actions Act [Chapter 8:17] provides for and regulates a general statutory procedure of bringing a class action in *any* legal dispute²⁵⁰ while section 85 (1) (c) of the Constitution is concerned about class actions for matters to do with violations of the Declaration of Rights only.²⁵¹ Therefore the class action regulated by the Class Actions Act may not necessarily be the same as that regulated by section 85 (1) (c) of the Constitution, and as such, the Class Actions Act may not be the enabling legislation for section 85 (1) (c) of the Constitution. The legislature should review the provisions and decide whether the Class Actions Act should be used as an enabling legislation for section 85 (1) (c) of the Constitution, if so they will need to ensure that the law is aligned with the spirit of liberal approach to determining *locus standi* enshrined under the Declaration of Rights.²⁵² However in the absence of a domestic precedence or enabling legislation, the courts will directly apply and interpret

²⁴⁸ See for example *Leslie Levente Petho v Minister of Home Affairs* [2002] ZWSC 80. Also see *Zimbabwe Tobacco Association v Reserve Bank of Zimbabwe* [2013] ZWHHC 77.

²⁴⁹ See section 3 and section 4 of the Class Actions Act [Chapter 8:17].

²⁵⁰ See the Long Title to the Class Actions Act [Chapter 8:17].

²⁵¹ See section 85 (1) of the Constitution of Zimbabwe.

²⁵² See the judgment of the Constitutional Court, handed down by Chidyausiku CJ in *Jealous Mawarire v Robert Gabriel Mugabe*.

section 85 (1) (c) of the Constitution²⁵³ and in that process, the requirements and factors set out under the Class Action Act may be considered as pointers towards the kind of requirements of class actions contemplated by section 85 (1) (c) of the Constitution.

In directly applying and interpreting requirements for bringing class actions envisaged by section 85 (1) (c) of the Constitution, the courts may consider the views of similar courts in comparative jurisdictions such as South Africa where similarly worded provisions exist and have been interpreted by the courts. In South Africa, the courts have ruled that for an individual to be able to litigate on the basis of provisions of the South African Constitution that are similar to section 85 (1) (c) of the Constitution of Zimbabwe, such a litigant must clearly identify the class of rights bearers, and must demonstrate that the class has the same cause of action,²⁵⁴ which is that their ESC right(s) have been violated or are under a threat of violation or a violation is presently taking place. Of course, the matter must concern a fundamental right provided for under the Declaration of Rights in the sense that there must be a violation or threat of violation of a right guaranteed under the Declaration of Rights,²⁵⁵ and the members of the class or group in whose interest the action is being brought must be holders of the right in question.

4. Persons acting in public interest

An action to enforce ESC rights can be brought on behalf of the public, on the basis of section 85 (1) (d).

For one to bring an action on the basis of section 85 (1) (d) concerning public interest, under the Constitution of Zimba-

²⁵³ This position was confirmed by the High Court of Zimbabwe through a judgment delivered by Mathonsi J in *Peter Makani and others v Epworth Local Board and others* HH 550-14.

²⁵⁴ See the decision of the South African High Court in *Maluleke v MEC Health and Welfare Northern Province* 1999 (4) SA 367 (T).

²⁵⁵ See section 85 (1) of the Constitution of Zimbabwe.

bwe, it is clear that the matter must concern a right enshrined under the Declaration of Rights, which either has been violated or is under an impending threat of violation.

The current jurisprudence in Zimbabwe does not, however, include information on the full requirements for one to litigate an issue on a right guaranteed under the Declaration of Rights in the interest of the public. The Zimbabwean courts will thus enjoy some degree of discretion in determining whether someone is indeed acting in public interest or not. However, the discretion must obviously not deviate from the position already taken by the Constitutional Court of Zimbabwe in *Jealous Mawarire v Robert Mugabe* that the courts must give effect to the liberal or flexible approach to determining *locus standi*.

Looking at comparative jurisdictions can be useful.²⁵⁶

The South African Constitutional Court ruling in *Ferreira v Levin NO 1996 (1) SA 984 (CC)* may be instructive; it provides some clear guidelines, stating that the following factors must be considered when determining whether someone is indeed acting in the interest of the public:

"whether there is another reasonable and effective manner in which the challenge can be brought before the court, the nature of relief sought and the extent to which it is of general application, the nature of persons or groups who may be directly or indirectly affected by an order made by the court and the opportunity that those persons or groups have to present evidence and argument to court."

While, in accordance with section 46 (e) of the Constitution of Zimbabwe, which states that when interpreting the Declaration of Rights, relevant foreign law may be considered, the above ruling could have persuasive force in Zimbabwe, the factors should not however be taken as cast in stone. Even in South

²⁵⁶ Section 46 (1) (e) allows courts the discretion to consider relevant foreign law when interpreting provisions under the Declaration of Rights.

Africa, the same (Constitutional) Court held in a similar case²⁵⁷ that this should not be taken as an exhaustive list of factors.

Other factors that can be considered are the nature of the ESC right infringed; the consequences or likely consequences of the infringement of that right; and the vulnerability of the people likely to be affected by the sought remedy.²⁵⁸

5. Association acting in the interests of its members

It is possible that an association or group of persons can litigate on behalf of its members when any of the ESC rights of its members is violated or is under a threat of a violation.²⁵⁹ Section 85 (1) (e) allows such associations or groups to act in the interests of their members.

Apart from demonstrating that the case concerns a violation or impending violation of a right guaranteed under the Declaration of Rights, the litigating association must also show that the persons in whose favour the action is brought are *bona fide* members of the said association and have sufficient interest in the remedy being sought.

The table below provides a summary of the preceding discussion on requirements of each of the constitutionally provided types of *locus standi*, for bringing an action to enforce ESC rights under the Declaration of Rights in Zimbabwe.

²⁵⁷ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), para. 18.

²⁵⁸ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC), para. 18.

²⁵⁹ See for example *Mufakose Flats Residents Association v Minister, Local Government and National Housing* [2002] ZWHHC 50. Membership based civic movements such as women's associations, rate payers associations can litigate on the basis of this *locus standi*.

Type of <i>locus standi</i>	Relevant Constitutional provisions	Key Requirements
<p>Persons acting in their own interest (e.g. <i>Farai Mushoriwa v City of Harare</i> [2014] ZWHHC 195)</p>	<p>Sec. 85 (1) (a)</p>	<p>Applicants must:</p> <ul style="list-style-type: none"> • Show that he or she is a bearer of the right(s) concerned; • Show that the right(s) concerned is provided for under the Declaration of Rights; • Show that the right is being violated or a threat of violation has arisen; • Show that he or she has sufficient interest in the remedy sought.
<p>Person acting on behalf of another person (e.g <i>St Gorges College Parents and Teachers Association and Another v Minister of Education, Sports and Culture and Others</i> [2004] ZWHHC 112)</p>	<p>Sec. 85 (1) (b)</p>	<ul style="list-style-type: none"> • Identify the person in whose interest the action is being brought; • Show that such a person is a bearer of the right(s) in question; • Show that the right(s) in question is provided for under the Declaration of Rights; • The person in whose favour the action has been brought has consented to the action or where it is impossible to obtain consent, show that the person would have consented to such action being taken by the applicant;

		<ul style="list-style-type: none"> • The person in whose favour the action is being taken has sufficient interest in the remedy sought.
Person acting in the interests of a group or class of persons	Sec. 85 (1) (c)	<p>Currently, without clarity on the relationship between the Class Actions Act [Chapter 8:17] and section 85 (1) (c) of the Constitution, the following requirements that have been suggested in South Africa, a comparative jurisdiction, may provide guidance:</p> <ul style="list-style-type: none"> • The matter must concern a fundamental right provided for under the Declaration of Rights; • There must be a violation or threat of violation of that right; • The class in whose interest the action is being brought must be holders of the right in question; • The class of rights holders must be clearly identified and they must have sufficient interest in the remedy being sought; • The members of the class represented must have the same cause of action.

<p>An action brought in the public interest</p>	<p>Sec. 85 (1) (d)</p>	<p>While currently there is no sufficient information in the Zimbabwean jurisprudence on the specific requirements, the South African Constitutional Court has (not in exhaustive terms) identified the following as factors to be considered:</p> <ul style="list-style-type: none"> • The matter must concern a right provided for under the Declaration of Rights which either has been violated or is under an impending threat of violation; • Show that there is no other reasonable and effective manner in which the challenge can be brought before the court; • The nature of relief sought is such that it does not unfairly prejudice anyone, especially leading to human rights violations; • Show the nature of persons or groups who may be directly or indirectly affected by the sought remedy and whether such persons will have an opportunity to make submissions to the court.
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<p>An association acting on behalf or in the interests of its members (e.g. <i>Association of Independent Journalists and Others v Minister of State for Information and Publicity in the President's Office and Others</i> [2004] ZWSC 140)</p>	<p>Sec. 85 (1) (e)</p>	<ul style="list-style-type: none"> • Demonstrate that the case concerns a violation or impending violation of a right guaranteed under the Declaration of Rights; • The persons in whose favour the action is brought are <i>bona fide</i> members of the said association; • Those members are holders of the rights in question; • Those members have a sufficient interest in the remedy being sought.
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IV. Interpretation of ESC rights in Zimbabwe

Having dealt with the question of *locus standi*, the next thing to do for the litigator is to develop the arguments for the case. In the case of the adjudicators, the next step would be to examine the merits of the arguments advanced in the case. This involves engaging in interpreting the constitutional provisions.

As previously noted, section 46 of the Constitution of Zimbabwe is a provision which clarifies both the sources that *must* be followed when interpreting the provisions of the Declaration of Rights and those that *may* be followed. These are discussed in the paragraphs below.

1. Guiding principles

When interpreting provisions under the Declaration of Rights, including provisions on ESC rights, the courts are directed by the Constitution to do so in a manner that gives full effect to

the rights set out under the Declaration of Rights.²⁶⁰ Thus when interpreting the scope, content and meaning of the ESC rights guaranteed under the Declaration of Rights, the courts must prefer an interpretation that gives complete (full) effect to those rights as opposed to an interpretation that gives a restricted effect to the fundamental rights in question. This position was recently affirmed by the Constitutional Court in *Daniel Madzimbamuto v Registrar General and others* [2014] ZWCC 5 in which Ziyambi J observed and reproduced in her judgment the following ruling by the Supreme Court of Zimbabwe in *Ratigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H:

"This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose..."

Although this judgment concerned a civil right, the same rule of constitutional interpretation applies to the interpretation of ESC rights by virtue of the fact that ESC rights are regulated by the same interpretation guidelines regulating civil and political rights under the Constitution of Zimbabwe. Effectively this means, whenever faced with a situation where there are numerous interpretations of the constitutional provisions on the ESC rights, the Court must determine and choose the interpretation that gives the widest or fullest effect to the right under consideration. The spirit and purpose of the Declaration of Rights is to ensure that individuals in Zimbabwe enjoy the rights guaranteed therein to the fullest extent and those rights can only be limited in terms of the guidelines imposed under section 86 of the Constitution.

²⁶⁰ See section 46(1) (a) of the Constitution of Zimbabwe.

When interpreting ESC rights²⁶¹ under the Declaration of Rights, the courts in Zimbabwe are constitutionally directed to prefer an interpretation that promotes the values and principles underpinning a democratic constitutional society based on openness, justice, human dignity, equality and freedom.²⁶² This is quite a profound directive especially in the context of ESC rights adjudication. By their nature, ESC rights are generally there to protect the dignity of human beings by securing and protecting their basic social, economic and cultural welfare interests.²⁶³ Essentially, protecting ESC rights is at the core of defending and protecting the inherent dignity of human beings. Therefore, Courts are directed to prefer interpretation of ESC rights that firmly secures such values as human dignity, because recognizing and protecting inherent human dignity is a value underlying the Zimbabwean constitutional state.²⁶⁴ Courts should not accept interpretations that derogate or undermine those constitutional values and principles. There are of course many other constitutional values to which ESC rights relate very well and it is the duty of the litigator to identify those and bring them to the attention of the Court so that the adjudicators will take them into account when interpreting the ESC rights in question. These values and principles can be found under section 3 as well as the preamble of the Constitution.

Section 46 (2) of the Constitution of Zimbabwe also lays down a very important guideline that is helpful in ESC rights adjudication. When interpreting legislation or when developing common law or customary law, the Courts are obliged to promote and be guided by the spirit and objectives of the Declaration of Rights. Although the Declaration of Rights can be directly en-

²⁶¹ As well as interpreting provisions of all other fundamental rights guaranteed under the Declaration of Rights.

²⁶² See section 46 (1) (b) of the Constitution of Zimbabwe.

²⁶³ Justice Alfred Mavedzenge and Douglas J Coltart "A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental socio-economic and cultural Human Rights" (2014), p. 32.

²⁶⁴ See section 3 of the Constitution of Zimbabwe, relating to founding values and principles.

forced,²⁶⁵ in most cases and ideally, the rights guaranteed under the Declaration of Rights are implemented through the enabling legislation. The arrangement that constitutional rights are ideally implemented through enabling legislation effectively puts interpretation of legislative provisions under spotlight. However this does not mean that legislation replaces the constitutional provisions themselves. The constitutional provisions remain the standard against which the legislation must conform. In that regard, the enabling legislation must give full effect to the relevant rights provided for under the Declaration of Rights and therefore such legislation cannot derogate from the standards set by the Constitution. The Constitution directs that the Courts must interpret legislation in a manner that gives full effect to the rights enshrined under the Declaration of Rights. Where the legislation is not capable of an interpretation that complies with the objectives or standards set out by the Constitution, then the Court will find and declare such legislation to be unconstitutional.

Section 46 (1) (d) of the Constitution directs courts to pay due regard to all the provisions of the Constitution when interpreting provisions under the Declaration of Rights. This is a long established rule of constitutional interpretation in Zimbabwe and was laid down by the previous Constitutional Court through its ruling in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H where Ziyambi J held that, when interpreting the Declaration of Rights: "*All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed.*"

In terms of this principle, when interpreting ESC rights, the courts will have to take into account relevant provisions elsewhere from outside the specific provisos of that ESC right, and where there are derogations, such derogations must be inter-

²⁶⁵ This means invoking the constitutional provisions guaranteeing the fundamental rights, as opposed to invoking legislation that seeks to implement the relevant constitutional provisions.

preted narrowly in order to allow a wide enjoyment of the right. In order to understand the scope of State obligations, particular regard must be given to the principles and objectives set out under Chapter 2 of the Constitution²⁶⁶, and when determining the scope of ESC rights, regard must be paid to the provisions under Part 3 of the Declaration of Rights which is an elaboration of the rights set out under Part 2 of the same Declaration of Rights.²⁶⁷

2. The role of international and comparative foreign law

When interpreting the scope and meaning of ESC rights in Zimbabwe, section 46 (1) (c) of the Constitution requires courts to take into account international law and all treaties and conventions to which Zimbabwe is party. Applicable international law in terms of section 46 (1) (c) includes at a minimum, principles accepted as international customary law as well as treaties that Zimbabwe is party to. In addition, section 46 (1) (e) of the Constitution provides that courts may have reference to relevant foreign law, when interpreting provisions of the Declaration of Rights.

Under the Chapter 2 on “Applicable International Standards for the Promotion and Protection of ESC Rights in Zimbabwe”, this Guide provides a discussion on the relevant international and foreign case law that Zimbabwean legal practitioners can refer to when interpreting ESC rights provided for under the Zimbabwean Declaration of Rights.

a) International law

In particular, earlier sections of the present Guide highlight some of the key provisions of treaties and conventions applicable in Zimbabwe. In so far as ESC rights litigation is con-

²⁶⁶ Justice Alfred Mavedzenge and Douglas J Coltart “A Constitutional Law Guide Towards Understanding Zimbabwe’s Fundamental socio-economic and cultural Human Rights” (2014), p. 58.

²⁶⁷ *Ibid.*

cerned, the ICESCR, as further elucidated in the General Comments, jurisprudence and Concluding Observations of the CESCR, and the decisions of the African Commission on Human and Peoples' Rights when interpreting the African Charter on Human and Peoples' Rights, form an integral part of international law which must be taken into account when determining the scope, content and meaning of ESC rights in Zimbabwe.

Legal practitioners may have doubts as to when to refer to international law in application of section 46 (1) (c) of the Constitution. By virtue of section 46 (1) (c), it is relevant where there is ambiguity in relation to the scope, content and meaning of an ESC right provision under the Constitution, and the courts cannot allow an interpretation that conflicts with international law or treaties to which Zimbabwe is a State party.

b) Foreign law

Unlike the case of international law which *must* be considered by courts interpreting the scope of rights enshrined in the Declaration of Rights, the courts *have discretion* to consider relevant foreign law when interpreting provisions under the Declaration of Rights such as determining the scope, content and meaning of ESC rights.²⁶⁸

Again, it becomes relevant to refer to comparative foreign law where the Court is faced with an ambiguity concerning the meaning of a provision under the Declaration of Rights, and where the ambiguity has not been appropriately addressed by the domestic legislation or case law. The applicable, relevant foreign law includes decisions made by foreign courts. However given the wording of the provision that specifies "relevant" foreign law, the law to be considered ought to be from a comparative jurisdiction. Comparative jurisdiction could include, among others, those foreign jurisdictions where a similar con-

²⁶⁸ See section 46 (1) (e) of the Constitution of Zimbabwe.

stitutional provision exists and has been interpreted in similar cases.²⁶⁹

Notwithstanding the fact that relevant foreign law is limited to having persuasive force, the role of foreign law at this point in Zimbabwe cannot be underestimated. Justiciable ESC rights are a new constitutional phenomenon in Zimbabwe and the courts are still in the early stages of developing the jurisprudence on the interpretation of ESC rights. Zimbabwean courts will therefore need to look to not just international law but comparative foreign law as well, in developing Zimbabwean jurisprudence on the scope, content and meaning of ESC rights that are guaranteed under the Declaration of Rights.

V. Forums for Enforcing ESC Rights in Zimbabwe

In preceding sections, this Guide provided a summary of considerations that a victim of ESC rights violations should keep in mind when deciding on the most appropriate forum(s) for seeking to enforce the threatened or violated right or rights.

This part of the Guide carries on with that discussion and provides information on the different forums within Zimbabwe that human rights practitioners or victims of violations in Zimbabwe can engage with. It also provides information about the roles of civil society organizations and identifies some of those that might be relevant to practitioners and victims of ESC rights violations.

1. Courts

In terms of the Constitution of Zimbabwe, the courts remain a primary forum for the enforcement of fundamental rights, including ESC rights.²⁷⁰ In particular, section 85 states that:

²⁶⁹ See for instance, the High court of Zimbabwe in *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195 considered the decision of the Supreme Court of South Africa in *City of Cape Town v Strumpher* (104/11) (2012) ZASCA 54 because the case was related to the one before the court.

²⁷⁰ See section 165 (1) (c) which states that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law.

“(1) Any of the following persons, namely--
(a) any person acting in their own interests;
(b) any person acting on behalf of another person who cannot act for themselves;
(c) any person acting as a member, or in the interests, of a group or class of persons;
(d) any person acting in the public interest;
(e) any association acting in the interests of its members;
is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.
(2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).
(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that—
(a) the right to approach the court under subsection (1) is fully facilitated;
(b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
(c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
(d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.
(4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.”

Since the advent of the new Constitution, the High Court of Zimbabwe has underscored that it is the primary function of the judiciary to interpret and enforce the law when individuals complain that their human rights have been violated.²⁷¹ This is because the courts have the necessary constitutional mandate to provide the victims of human rights violations with appro-

²⁷¹ See the judgment of Bhunu J in *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195, p. 5.

appropriate relief.²⁷² Section 69 (3) provides every person in Zimbabwe with the right to approach the court for fair resolution of legal disputes. This right puts beyond question the fact that the courts are indeed clothed with the mandate to review the constitutionality or legality of decisions of the State or any other person bound by the Declaration of Rights in terms of section 44 of the Constitution.

Section 162 of the Constitution provides a list of courts which are available to adjudicate on matters brought by individuals. Subject to considerations including standing as detailed in Section III above, as well as to the rules of procedure, individuals can bring action before these courts for the enforcement of any of the ESC rights.

However, it is important to consider the subject matter jurisdiction of the particular courts. In that regard it is important to note that there are special courts that have been established to adjudicate on certain matters. For instance, with respect to ESC rights, the Labour court is specifically established to adjudicate on labour relations matters brought up in terms of the Labour Relations Act.²⁷³ Thus, although the High Court has inherent jurisdiction to adjudicate on any fundamental rights²⁷⁴, a labour related matter must be brought before the specialized court -the Labour Court- if that court has the jurisdiction to provide an appropriate relief that is sought by the litigator.

More often, litigators are faced with a situation where they have to choose whether to directly approach the Constitutional Court or the High Court for the enforcement of ESC rights. The

²⁷² See section 165 (1) (b) of the Constitution of Zimbabwe directing the courts to ensure that justice is not delayed and adjudication must be performed efficiently and with reasonable promptness. See also section 85 of the Constitution.

²⁷³ See the decision of the High Court of Zimbabwe in *Tuso v City of Harare*, 2004 (1) ZLR 1 (H) wherein the court held that the Labour Court has exclusive jurisdiction to hear matters brought in terms of the Labour Relations Act.

²⁷⁴ As confirmed by Bhunu J in his judgment in *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195.

Constitutional Court is the highest and final court in all constitutional matters.²⁷⁵

There are three ways of bringing an action before the Constitutional Court. One can bring an action directly before the Constitutional Court in accordance section 85 (1) and section 167 (5) (a)²⁷⁶ of the Constitution. However, the Constitutional Court has discretion to allow individuals to have such direct access.²⁷⁷ The court will decide on this on the basis a variety of factors that include the urgency of the matter, the nature of the remedy sought and the circumstances of the violation. Where the violation is serious and ongoing and the litigator urgently needs a final decision to end the violation, the Constitutional Court will likely be the most appropriate forum in which to file a case, as its decision will be final and not open to an appeal.

A question of constitutional law that arises within the course of the proceedings in a case filed in another court may also be referred by that court to the Constitutional Court.²⁷⁸ In such an event, at either of the litigants' request, the presiding officer of the court may refer a specific question of constitutional law (usually to do with the appropriate interpretation of a constitutional provision) to the Constitutional Court for determination.

A matter may also be brought before the Constitutional Court as an appeal from the Supreme Court, or any other court²⁷⁹, provided that the appeal is on a constitutional matter. For example after the Supreme Court of Zimbabwe handed down a

²⁷⁵ Section 167 (1) (a) of the Constitution of Zimbabwe, relating to jurisdiction of the Constitutional Court.

²⁷⁶ Section 167 (5) (a) states that the "*Rules of the Constitutional Court must allow a person, when it is in the interests of justice and with or without leave of the Constitutional Court--*

a. to bring a constitutional matter directly to the Constitutional Court;"

²⁷⁷ In terms of the rules of procedure for the Constitutional Court, the court determines whether one should approach the court as the court of first instance or appeal.

²⁷⁸ Section 175 (4) of the Constitution of Zimbabwe.

²⁷⁹ Section 167 (5) (b) of the Constitution of Zimbabwe.

judgment in *Nyamande and others v Zuva Petroleum Pty LTD* Judgment No. SC 43/15, a case that concerned a labour dispute, the appellant appealed to the Constitutional Court on the basis that the Supreme Court had misinterpreted the position of common law in relation to the labour rights enshrined under the Constitution.

In addition to being party in a case pending before the Constitutional Court, one can also request to become an *amicus curiae* (friend of the court).²⁸⁰ Where the Constitutional Court is seized with a matter, one can request to join the proceedings as *amicus* and the court may grant the request provided the person requesting to appear as *amicus* will provide information which will help the court to make a proper determination on a specific point of law. Apart from appearing before the courts as one of the litigants, NGOs and civil society organizations should also consider joining proceedings as *amicus* with an aim of aiding the court to interpret constitutional provisions relating to the enforcement of ESC rights and the right to a remedy, including a manner consistent with international standards.

As indicated earlier, the Constitutional Court is not the only court that is available to enforce fundamental rights. However it must be recalled that though the Supreme Court, and the High Court can make rulings on the constitutionality of a law, or an act of the President or legislature, its finding of constitutional invalidity must be confirmed by the Supreme Court.²⁸¹

Thus, the High Court might also be an option. In cases requiring it the victim can seek interim relief through an urgent chamber application to stop the ongoing violation.²⁸² But it

²⁸⁰ Section 167 (5) (c) of the Constitution of Zimbabwe.

²⁸¹ Section 167 (3) of the Constitution of Zimbabwe.

²⁸² See for instance the decision of the High court in *Peter Makani and Others v Epworth Local Board and others* HH 550-14 in which the court gave an interdict to stop ongoing unlawful demolition of homes. See also *Farai Mushoriwa v City of Harare* [2014] ZWHHC 195 where the court handed down a judgment ordering the Respondent to restore water supply which had been disconnected in violation of the right to water.

must be noted that decisions of the High Court, including to grant interim relief, may be appealed and such an appeal of an interim order may mean that the court's decision to stop the violation is suspended until the court of appeal makes a determination on the appeal. Furthermore, as noted just above, while the High Court has jurisdiction to rule on a constitutional issue, such rulings are subject to the confirmation by the Constitutional Court prior to their implementation.

The Magistrate's Court is also competent to hear and determine cases on ESC rights violations.²⁸³ However, where the litigator intends to challenge the constitutional validity of a law, the Magistrate's Court will not be an appropriate forum as the court does not have the competence to pronounce itself on the constitutionality of legislation.

2. Independent commissions

Chapter 12 of the Constitution establishes a number of independent commissions which can be approached for redress by victims of human rights violations in Zimbabwe. These commissions are the Zimbabwe Human Rights Commission, the Zimbabwe Gender Commission, the National Peace and Reconciliation Commission and the Zimbabwe Media Commission.

Whilst all these commissions deal with the issue of human rights protection from different angles, in deciding whether to approach the courts or the independent commissions or a particular independent commission, as a human rights practitioner, amongst other things, one must consider both the jurisdiction of the particular commission and the nature of claim and the relief the client seeks. The practitioner should pay particu-

²⁸³ See the decision of the Magistrate's Court in *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing cooperative*, 106/14 in which the court gave an interdict preventing the Respondent from conducting demolitions that were found to be in violation of section 74 right to freedom from arbitrary eviction.

lar attention to whether the forum being considered has the competence to provide the type of relief sought.²⁸⁴

As discussed earlier in Chapter 1, Section II. 1. f), the Zimbabwe Human Rights Commission (ZHRC) is established by the Constitution to promote awareness of and respect for human rights and freedoms in Zimbabwe.²⁸⁵ The following are some of the powers that the Commission has under section 243 of the Constitution:

- Monitor, investigate and report on matters concerning the protection of human rights in Zimbabwe;
- Receive and assess complaints of human rights violations and to take any action it deems appropriate to secure redress for such violations or to prevent or stop the violations;
- To direct the Commissioner General of Police to investigate cases of suspected or proven criminal activity relating to human rights violations and summoning the Commissioner General of police to report to the Commission on the findings of the investigation;
- To provide recommendations to the legislature on measures that can be taken to address matters of human rights protection in Zimbabwe.

An analysis of section 243 of the Constitution, relating to the powers and function of the ZHRC, indicates that the Constitution gives the Commission wide ranging powers to do what it can to promote the protection and respect of human rights in Zimbabwe. In that regard, the ZHRC has the authority to initiate investigations on its own or to receive complaints and then conduct investigations. It also enjoys discretion on the nature of measures that it can take to secure redress for human

²⁸⁴ Please see Chapter 1, Section II of this Guide for strategic considerations that one must make when deciding which forum to approach.

²⁸⁵ Section 243 (1) (a) of the Constitution of Zimbabwe.

rights violations or to prevent or stop the violations.²⁸⁶ Therefore the ZHRC remains an option open to legal practitioners who intend to enforce ESC rights in Zimbabwe.

The Zimbabwe Gender Commission (ZGC), established under section 245 of the Constitution is another constitutional commission that can be used to enforce ESC rights in Zimbabwe. Primarily, the ZGC is mandated to monitor, investigate and report on matters to do with the protection and respect for human rights relating to gender.²⁸⁷

As discussed earlier on (Section II. 2. above), guaranteeing gender equality is key to the realization of ESC rights. In that regard, the ZGC could play a pivotal role in ensuring that the principle of non-discrimination is adhered to in the fulfilment and enjoyment of ESC rights in Zimbabwe. The Constitution gives the ZGC wide discretion to decide on appropriate measures that it can impose in order to promote gender equality as well as the power to secure appropriate redress where rights relating to gender have been violated.²⁸⁸ Legal practitioners should thus consider whether the ZGC is an option to engage with in regards to cases of unfair discrimination based on gender, in the respect, protection, fulfilment and enjoyment of ESC rights in Zimbabwe.

Notwithstanding the wide powers, discretion and mandates of both the ZHRC and the ZGC, these Commissions do not “replace” courts, and their decisions are subject to judicial review.

Following on from discussion in Chapter 1, section II. 1. f) on the role of national human rights institutions in the enforcement of ESC rights, and in the light of foreign jurisdictions with similar commissions, with similarly wide mandates and discretion, it would appear that the type of measures that these commissions can take to redress human rights violations

²⁸⁶ Section 243 (1) (d) and 243 (1) (g) of the Constitution of Zimbabwe.

²⁸⁷ Section 246 (a) and (b) of the Constitution of Zimbabwe.

²⁸⁸ Section 246 (h) and 246 (i) of the Constitution of Zimbabwe.

must respect the fundamental rights of the persons involved, especially those relating to due process and should generally include charging punitive fines, ordering the offenders to take certain action or reverse certain decisions. It would also appear that such measures may not include measures that result in imprisonment of persons as that is a decision that should be taken by courts after a proper and sufficient consideration of the facts and circumstances of the case.

VI. The role of civil society

Last but not least, civil society organizations including human rights NGOs and community-based organizations, can play a fundamental role in the process of seeking a remedy for violations of ESC rights including through litigation. Depending on their expertise and mandates, they can:

- inform victims about their rights and identify violations;
- document violations and help gathering evidence;
- be directly involved in providing legal advice and in litigation;
- amicus curiae briefs and expert opinions in cases being litigated;
- provide background information that can serve as or lead to the identification of evidence and can inform decisions on remedies;
- assist in monitoring the implementation of court decisions.

Some of the Zimbabwean civil society organizations that practitioners may want to approach and consult concerning ESC rights include:

- Zimbabwe Human Rights Association

http://www.zimrights.co.zw/index.php?option=com_content&

[view=article&id=1&Itemid=2](#)

- Zimbabwe Lawyers for Human Rights

<http://www.zlhr.org.zw>

- Zimbabwe Human Rights NGO Forum

<http://www.hrforumzim.org>

In addition, the National Law Society of Zimbabwe is an organization that can help with the identification of lawyers who have relevant specializations and experience. For more information and contacts, visit:

<http://www.lawsociety.org.zw>

Annex 1: 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/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11

Optional Protocols

- 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>

- Optional Protocol to the International Convention on the Rights of Persons with Disabilities

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.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/RegulationSession/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#P106044517>

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

- OHCHR jurisprudence database on communications under UN treaty bodies, accessible at: <http://juris.ohchr.org>
- 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.oup.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 Litigio 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: slt29@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

Justiciability 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-internacional-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

- 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>
- 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.

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.

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ISBN 978-92-9037-213-4



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