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**HUMAN RIGHTS INSTRUMENTS**

**Volume I**

**COMPILATION OF GENERAL COMMENTS AND  
GENERAL RECOMMENDATIONS ADOPTED BY  
HUMAN RIGHTS TREATY BODIES**

**Note by the Secretariat**

This document contains a compilation of the general comments or general recommendations adopted, respectively, by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women, the Committee against Torture and the Committee on the Rights of the Child. The Committee on Migrant Workers has not yet adopted any general comments.

## CONTENTS

	<i>Page</i>
I. GENERAL COMMENTS ADOPTED BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS .....	1
General comment No. 1: Reporting by States parties .....	1
General comment No. 2: International technical assistance measures (art. 22 of the Covenant) .....	4
General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant) .....	7
General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant) .....	11
General comment No. 5: Persons with disabilities .....	17
General comment No. 6: The economic, social and cultural rights of older persons .....	27
General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions .....	38
General comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights .....	43
General comment No. 9: The domestic application of the Covenant .....	47
General comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights .....	51
General comment No. 11: Plans of action for primary education (art. 14) .....	52
General comment No. 12: The right to adequate food (art. 11) .....	55
General comment No. 13: The right to education (art. 13) .....	63
General comment No. 14: The right to the highest attainable standard of health (art. 12) .....	78
General comment No. 15: The right to water (arts. 11 and 12 of the Covenant) .....	97
General comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3) .....	113

CONTENTS (*continued*)

	<i>Page</i>
General comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15) .....	123
General comment No. 18: The right to work (art. 6) .....	139
General comment No. 19: The right to social security (art. 9) .....	152
<del>II. GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE .....</del>	<del>172</del>
<del>General comment No. 1: Reporting obligation .....</del>	<del>173</del>
<del>General comment No. 2: Reporting guidelines .....</del>	<del>173</del>
<del>General comment No. 3: Article 2 (Implementation at the national level) .....</del>	<del>174</del>
<del>General comment No. 4: Article 3 (Equal right of men and women to the enjoyment of all civil and political rights) .....</del>	<del>175</del>
<del>General comment No. 5: Article 4 (Derogations) .....</del>	<del>176</del>
<del>General comment No. 6: Article 6 (Right to life) .....</del>	<del>176</del>
<del>General comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment) .....</del>	<del>178</del>
<del>General comment No. 8: Article 9 (Right to liberty and security of persons) .....</del>	<del>179</del>
<del>General comment No. 9: Article 10 (Humane treatment of persons deprived of their liberty) .....</del>	<del>180</del>
<del>General comment No. 10: Article 19 (Freedom of opinion) .....</del>	<del>181</del>
<del>General comment No. 11: Article 20 .....</del>	<del>182</del>
<del>General comment No. 12: Article 1 (Right to self-determination) .....</del>	<del>183</del>
<del>General comment No. 13: Article 14 (Administration of justice) .....</del>	<del>184</del>
<del>General comment No. 14: Article 6 (Right to life) .....</del>	<del>188</del>
<del>General comment No. 15: The position of aliens under the Covenant .....</del>	<del>189</del>

## **I. GENERAL COMMENTS ADOPTED BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

### **Introduction: the purpose of general comments\***

1. At its second session, in 1988, the Committee decided (E/1988/14, paras. 366 and 367), pursuant to an invitation addressed to it by the Economic and Social Council (resolution 1987/5) and endorsed by the General Assembly (resolution 42/102), to begin, as from its third session, the preparation of general comments based on the various articles and provisions of the International Covenant on Economic, Social and Cultural Rights with a view to assisting the States parties in fulfilling their reporting obligations.
2. The Committee, and the sessional working group of governmental experts which existed prior to the creation of the Committee, have examined 138 initial reports and 44 second periodic reports concerning rights covered by articles 6 to 9, 10 to 12 and 13 to 15 of the Covenant as of the end of its third session. This experience covers a significant number of States parties to the Covenant, currently consisting of 92 States. They represent all regions of the world, with different socio-economic, cultural, political and legal systems. Their reports submitted so far illustrate many of the problems which might arise in implementing the Covenant although they have not yet provided any complete picture as to the global situation with regard to the enjoyment of economic, social and cultural rights. The introduction to annex III (General comments) of the Committee's 1989 report to the Economic and Social Council (E/1989/22) explains the purpose of the general comments as follows.
3. "The Committee endeavours, through its general comments, to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant. Whenever necessary, the Committee may, in the light of the experience of States parties and of the conclusions which it has drawn therefrom, revise and update its general comments."

### **Third session (1989)\***

#### **General comment No. 1: Reporting by States parties**

1. The reporting obligations which are contained in part IV of the Covenant are designed principally to assist each State party in fulfilling its obligations under the Covenant and, in addition, to provide a basis on which the Council, assisted by the Committee, can discharge its

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\* Contained in document E/1989/22.

responsibilities for monitoring States parties' compliance with their obligations and for facilitating the realization of economic, social and cultural rights in accordance with the provisions of the Covenant. The Committee considers that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant, the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.

2. A *first objective*, which is of particular relevance to the initial report required to be submitted within two years of the Covenant's entry into force for the State party concerned, is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.

3. A *second objective* is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The Committee is aware that this process of monitoring and gathering information is a potentially time-consuming and costly one and that international assistance and cooperation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be required in order to enable some States parties to fulfil the relevant obligations. If that is the case, and the State party concludes that it does not have the capacity to undertake the monitoring process which is an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective implementation of the Covenant, it may note this fact in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

4. While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a *third objective* of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken. While the Covenant makes this obligation explicit only in article 14 in cases where "compulsory primary education, free of charge" has not yet been secured for all, a comparable obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the Covenant is clearly implied by the obligation in article 2, paragraph 1 "to take steps ... by all appropriate means ...".

5. A *fourth objective* of the reporting process is to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. In examining reports submitted to it to date, the Committee has welcomed the fact that a number of States parties, reflecting different political and economic systems, have encouraged inputs by such non-governmental groups into the preparation of their reports under the Covenant. Other States have ensured the widespread dissemination of their reports with a view to enabling comments to be made by the public at large. In these ways, the preparation of the report, and its consideration at the national level can come to be of at least as much value as the constructive dialogue conducted at the international level between the Committee and representatives of the reporting State.

6. A *fifth objective* is to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific benchmarks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health-care provider, etc. In many of these areas, global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress.

7. In this regard, the Committee wishes to note that the Covenant attaches particular importance to the concept of “progressive realization” of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights. By the same token, it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.

8. A *sixth objective* is to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights. For this reason, it is essential that States parties report in detail on the “factors and difficulties” inhibiting such realization. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.

9. A *seventh objective* is to enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant. In order to underline the importance which the Committee attaches to this objective, a separate general comment on those articles will be discussed by the Committee at its fourth session.

**Fourth session (1990)\***

**General comment No. 2: International technical assistance measures  
(art. 22 of the Covenant)**

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant “which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the ... Covenant”. While the primary responsibility under article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.

2. Recommendations in accordance with article 22 may be made to any “organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance”. The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development cooperation. It would therefore be appropriate for recommendations in accordance with article 22 to be addressed, inter alia, to the Secretary-General, subsidiary organs of the Council such as the Commission on Human Rights, the Commission on Social Development and the Commission on the Status of Women, other bodies such as UNDP, UNICEF and CDP, agencies such as the World Bank and IMF, and any of the other specialized agencies such as ILO, FAO, UNESCO and WHO.

3. Article 22 could lead either to recommendations of a general policy nature or to more narrowly focused recommendations relating to a specific situation. In the former context, the principal role of the Committee would seem to be to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development cooperation activities undertaken by, or with the assistance of, the United Nations and its agencies. In this regard the Committee notes that the Commission on Human Rights, in its resolution 1989/13 of 2 March 1989, invited it “to give consideration to means by which the various United Nations agencies working in the field of development could best integrate measures designed to promote full respect for economic, social and cultural rights in their activities”.

4. As a preliminary practical matter, the Committee notes that its own endeavours would be assisted, and the relevant agencies would also be better informed, if they were to take a greater interest in the work of the Committee. While recognizing that such an interest can be demonstrated in a variety of ways, the Committee observes that attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies. The Committee considers that a

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\* Contained in document E/1990/23.

deeper understanding of the relevance of economic, social and cultural rights in the context of international development cooperation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies. At the very least, the day of general discussion on a specific issue, which the Committee undertakes at each of its sessions, provides an ideal context in which a potentially productive exchange of views can be undertaken.

5. On the broader issues of the promotion of respect for human rights in the context of development activities, the Committee has so far seen only rather limited evidence of specific efforts by United Nations bodies. It notes with satisfaction in this regard the initiative taken jointly by the Centre for Human Rights and UNDP in writing to United Nations Resident Representatives and other field-based officials, inviting their “suggestions and advice, in particular with respect to possible forms of cooperation in ongoing projects [identified] as having a human rights dimension or in new ones in response to a specific Government’s request”. The Committee has also been informed of long-standing efforts undertaken by ILO to link its own human rights and other international labour standards to its technical cooperation activities.

6. With respect to such activities, two general principles are important. The first is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly defined objectives, but also to enhanced enjoyment of the full range of human rights.

7. The second principle of general relevance is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of “development” have subsequently been recognized as ill-conceived and even counterproductive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalization of the principle contained in article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures which merit consideration by the relevant bodies:

(a) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognize the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic,



social and cultural rights in particular. The Committee notes in this regard the failure of each of the first three United Nations Development Decade Strategies to recognize that relationship and urges that the fourth such strategy, to be adopted in 1990, should rectify that omission;

(b) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979<sup>1</sup> that a “human rights impact statement” be required to be prepared in connection with all major development cooperation activities;

(c) The training or briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles;

(d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

9. A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as “adjustment with a human face” or as promoting “the human dimension of development” requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.

10. Finally, the Committee wishes to draw attention to the important opportunity provided to States parties, in accordance with article 22 of the Covenant, to identify in their reports any particular needs they might have for technical assistance or development cooperation.

#### **Note**

<sup>1</sup> “The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs” (E/CN.4/1334, para. 314).

**Fifth session (1990)\***

**General comment No. 3: The nature of States parties' obligations  
(art. 2, para. 1, of the Covenant)**

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate general comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination ...".

2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights,

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\* Contained in document E/1991/23.

the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, “shall have an effective remedy” (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered “appropriate” for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking “to take steps ... by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide

variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties’ reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover,

the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its general comment No. 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled “Adjustment with a human face: protecting the vulnerable and promoting growth,<sup>1</sup> the analysis by UNDP in its *Human Development Report 1990*<sup>2</sup> and the analysis by the World Bank in the *World Development Report 1990*.<sup>3</sup>

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is “to take steps, individually and through international assistance and cooperation, especially economic and technical ...”. The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in general comment No. 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies “the furnishing of technical assistance” as well as other activities, as being among the means of “international action for the achievement of the rights recognized ...”.

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its general comment No. 2 (1990).

#### Notes

<sup>1</sup> G.A. Cornia, R. Jolly and F. Steward, Eds., Oxford, Clarendon Press, 1987.

<sup>2</sup> Oxford, Oxford University Press, 1990.

<sup>3</sup> Oxford, Oxford University Press, 1990.

**Sixth session (1991)\***

**General comment No. 4: The right to adequate housing  
(art. 11 (1) of the Covenant)**

1. Pursuant to article 11 (1) of the Covenant, States parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.
2. The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third (see E/1989/22, para. 312) and fourth sessions (E/1990/23, paras. 281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987.<sup>1</sup> The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>2</sup>
3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing,<sup>3</sup> article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.
4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed.<sup>4</sup> There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing.
5. In some instances, the reports of States parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the State concerned. This general comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

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\* Contained in document E/1992/23.

6. The right to adequate housing applies to everyone. While the reference to “himself and his family” reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of “family” must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2 (2) of the Covenant, not be subject to any form of discrimination.

7. In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost”.

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

(a) *Legal security of tenure.* Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) *Availability of services, materials, facilities and infrastructure.* An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability*. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) *Habitability*. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the *Health Principles of Housing*<sup>5</sup> prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) *Accessibility*. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) *Location*. Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy*. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.



9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

10. Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognized in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating "self-help" by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a State party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11 (1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

11. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its general comment No. 2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

12. While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures". Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.

13. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations under article 11 (1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasize the need to “provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing”. They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in “illegal” settlements, those subject to forced evictions and low-income groups.

14. Measures designed to satisfy a State party’s obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of “enabling strategies”, combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.

15. Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind. Nevertheless, the role of formal legislative and administrative measures should not be underestimated in this context. The Global Strategy for Shelter (paras. 6-67) has drawn attention to the types of measures that might be taken in this regard and to their importance.

16. In some States, the right to adequate housing is constitutionally entrenched. In such cases the Committee is particularly interested in learning of the legal and practical significance of such an approach. Details of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18. In this regard, the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19. Finally, article 11 (1) concludes with the obligation of States parties to recognize “the essential importance of international cooperation based on free consent”. Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.

### Notes

<sup>1</sup> *Official Records of the General Assembly, Forty-third Session, Supplement No. 8, addendum (A/43/8/Add.1).*

<sup>2</sup> Commission on Human Rights resolutions 1986/36 and 1987/22; reports by Mr. Danilo Türk, Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/1990/19, paras. 108-120; E/CN.4/Sub.2/1991/17, paras. 137-139); see also Sub-Commission resolution 1991/26.

<sup>3</sup> See, for example, article 25 (1) of the Universal Declaration of Human Rights, article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, article 27 (3) of the Convention on the Rights of the Child, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements, 1976 (*Report of Habitat: United Nations Conference on Human Settlements* (United Nations publication, Sales No. E.76.IV.7 and corrigendum, chap. I), article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115)).

<sup>4</sup> See note 1.

<sup>5</sup> Geneva, World Health Organization, 1990.

**Eleventh session (1994)\***

**General comment No. 5: Persons with disabilities**

1. The central importance of the International Covenant on Economic, Social and Cultural Rights in relation to the human rights of persons with disabilities has frequently been underlined by the international community.<sup>1</sup> Thus a 1992 review by the Secretary-General of the implementation of the World Programme of Action concerning Disabled Persons and the United Nations Decade of Disabled Persons concluded that “disability is closely linked to economic and social factors” and that “conditions of living in large parts of the world are so desperate that the provision of basic needs for all - food, water, shelter, health protection and education - must form the cornerstone of national programmes”.<sup>2</sup> Even in countries which have a relatively high standard of living, persons with disabilities are very often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the Covenant.

2. The Committee on Economic, Social and Cultural Rights, and the working group which preceded it, have been explicitly called upon by both the General Assembly<sup>3</sup> and the Commission on Human Rights<sup>4</sup> to monitor the compliance of States parties to the Covenant with their obligation to ensure the full enjoyment of the relevant rights by persons with disabilities. The Committee’s experience to date, however, indicates that States parties have devoted very little attention to this issue in their reports. This appears to be consistent with the Secretary-General’s conclusion that “most Governments still lack decisive concerted measures that would effectively improve the situation” of persons with disabilities.<sup>5</sup> It is therefore appropriate to review, and emphasize, some of the ways in which issues concerning persons with disabilities arise in connection with the obligations contained in the Covenant.

3. There is still no internationally accepted definition of the term “disability”. For present purposes, however, it is sufficient to rely on the approach adopted in the Standard Rules of 1993, which state:

“The term ‘disability’ summarizes a great number of different functional limitations occurring in any population ... People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness. Such impairments, conditions or illnesses may be permanent or transitory in nature.”<sup>6</sup>

4. In accordance with the approach adopted in the Standard Rules, this general comment uses the term “persons with disabilities” rather than the older term “disabled persons”. It has been suggested that the latter term might be misinterpreted to imply that the ability of the individual to function as a person has been disabled.

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\* Contained in document E/1995/22.

5. The Covenant does not refer explicitly to persons with disabilities. Nevertheless, the Universal Declaration of Human Rights recognizes that all human beings are born free and equal in dignity and rights and, since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability. Moreover, the requirement contained in article 2 (2) of the Covenant that the rights "enunciated ... will be exercised without discrimination of any kind" based on certain specified grounds "or other status" clearly applies to discrimination on the grounds of disability.

6. The absence of an explicit, disability-related provision in the Covenant can be attributed to the lack of awareness of the importance of addressing this issue explicitly, rather than only by implication, at the time of the drafting of the Covenant over a quarter of a century ago. More recent international human rights instruments have, however, addressed the issue specifically. They include the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18). Thus it is now very widely accepted that the human rights of persons with disabilities must be protected and promoted through general, as well as specially designed, laws, policies and programmes.

7. In accordance with this approach, the international community has affirmed its commitment to ensuring the full range of human rights for persons with disabilities in the following instruments: (a) the World Programme of Action concerning Disabled Persons, which provides a policy framework aimed at promoting "effective measures for prevention of disability, rehabilitation and the realization of the goals of 'full participation' of [persons with disabilities] in social life and development, and of 'equality'";<sup>7</sup> (b) the Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies, adopted in 1990;<sup>8</sup> (c) the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted in 1991;<sup>9</sup> (d) the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (hereinafter referred to as the "Standard Rules"), adopted in 1993, the purpose of which is to ensure that all persons with disabilities "may exercise the same rights and obligations as others".<sup>10</sup> The Standard Rules are of major importance and constitute a particularly valuable reference guide in identifying more precisely the relevant obligations of States parties under the Covenant.

### **1. General obligations of States parties**

8. The United Nations has estimated that there are more than 500 million persons with disabilities in the world today. Of that number, 80 per cent live in rural areas in developing countries. Seventy per cent of the total are estimated to have either limited or no access to the services they need. The challenge of improving the situation of persons with disabilities is thus of direct relevance to every State party to the Covenant. While the means chosen to promote the full realization of the economic, social and cultural rights of this group will inevitably differ significantly from one country to another, there is no country in which a major policy and programme effort is not required.<sup>11</sup>

9. The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.

10. According to a report by the Secretary-General, developments over the past decade in both developed and developing countries have been especially unfavourable from the perspective of persons with disabilities:

“... current economic and social deterioration, marked by low-growth rates, high unemployment, reduced public expenditure, current structural adjustment programmes and privatization, have negatively affected programmes and services ... If the present negative trends continue, there is the risk that [persons with disabilities] may increasingly be relegated to the margins of society, dependent on ad hoc support.”<sup>12</sup>

As the Committee has previously observed (general comment No. 3 (Fifth session, 1990), para. 12), the duty of States parties to protect the vulnerable members of their societies assumes greater rather than less importance in times of severe resource constraints.

11. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasize certain aspects of States parties' obligations. One is the need to ensure that not only the public sphere, but also the private sphere, are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatized and in which the free market is being relied on to an ever greater extent, it is essential that private employers, private suppliers of goods and services, and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realize their full potential as active members of society will be severely and often arbitrarily constrained. This is not to imply that legislative measures will always be the most effective means of seeking to eliminate discrimination within the private sphere. Thus, for example, the Standard Rules place particular emphasis on the need for States to “take action to raise awareness in society about persons with disabilities, their rights, their needs, their potential and their contribution”.<sup>13</sup>

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the

results produced by market forces. Similarly, while it is appropriate for Governments to rely on private, voluntary groups to assist persons with disabilities in various ways, such arrangements can never absolve Governments from their duty to ensure full compliance with their obligations under the Covenant. As the World Programme of Action concerning Disabled Persons states, “the ultimate responsibility for remedying the conditions that lead to impairment and for dealing with the consequences of disability rests with Governments”.<sup>14</sup>

## **2. Means of implementation**

13. The methods to be used by States parties in seeking to implement their obligations under the Covenant towards persons with disabilities are essentially the same as those available in relation to other obligations (see general comment No. 1 (Third session, 1989)). They include the need to ascertain, through regular monitoring, the nature and scope of the problems existing within the State; the need to adopt appropriately tailored policies and programmes to respond to the requirements thus identified; the need to legislate where necessary and to eliminate any existing discriminatory legislation; and the need to make appropriate budgetary provisions or, where necessary, seek international cooperation and assistance. In the latter respect, international cooperation in accordance with articles 22 and 23 of the Covenant is likely to be a particularly important element in enabling some developing countries to fulfil their obligations under the Covenant.

14. In addition, it has been consistently acknowledged by the international community that policy-making and programme implementation in this area should be undertaken on the basis of close consultation with, and involvement of, representative groups of the persons concerned. For this reason, the Standard Rules recommend that everything possible be done to facilitate the establishment of national coordinating committees, or similar bodies, to serve as a national focal point on disability matters. In doing so, Governments should take account of the 1990 Guidelines for the Establishment and Development of National Coordinating Committees on Disability or Similar Bodies.<sup>15</sup>

## **3. The obligation to eliminate discrimination on the grounds of disability**

15. Both de jure and de facto discrimination against persons with disabilities have a long history and take various forms. They range from invidious discrimination, such as the denial of educational opportunities, to more “subtle” forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers. For the purposes of the Covenant, “disability-based discrimination” may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights. Through neglect, ignorance, prejudice and false assumptions, as well as through exclusion, distinction or separation, persons with disabilities have very often been prevented from exercising their economic, social or cultural rights on an equal basis with persons without disabilities. The effects of disability-based discrimination have been particularly severe in the fields of education, employment, housing, transport, cultural life, and access to public places and services.

16. Despite some progress in terms of legislation over the past decade,<sup>16</sup> the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties. Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.

17. Anti-discrimination measures should be based on the principle of equal rights for persons with disabilities and the non-disabled, which, in the words of the World Programme of Action concerning Disabled Persons, “implies that the needs of each and every individual are of equal importance, that these needs must be made the basis for the planning of societies, and that all resources must be employed in such a way as to ensure, for every individual, equal opportunity for participation. Disability policies should ensure the access of [persons with disabilities] to all community services”.<sup>17</sup>

18. Because appropriate measures need to be taken to undo existing discrimination and to establish equitable opportunities for persons with disabilities, such actions should not be considered discriminatory in the sense of article 2 (2) of the International Covenant on Economic, Social and Cultural Rights as long as they are based on the principle of equality and are employed only to the extent necessary to achieve that objective.

#### **4. Specific provisions of the Covenant**

##### **A. Article 3: Equal rights for men and women**

19. Persons with disabilities are sometimes treated as genderless human beings. As a result, the double discrimination suffered by women with disabilities is often neglected.<sup>18</sup> Despite frequent calls by the international community for particular emphasis to be placed upon their situation, very few efforts have been undertaken during the Decade. The neglect of women with disabilities is mentioned several times in the report of the Secretary-General on the implementation of the World Programme of Action.<sup>19</sup> The Committee therefore urges States parties to address the situation of women with disabilities, with high priority being given in future to the implementation of economic, social and cultural rights-related programmes.

##### **B. Articles 6-8: Rights relating to work**

20. The field of employment is one in which disability-based discrimination has been prominent and persistent. In most countries the unemployment rate among persons with disabilities is two to three times higher than the unemployment rate for persons without disabilities. Where persons with disabilities are employed, they are mostly engaged in low-paid jobs with little social and legal security and are often segregated from the mainstream of the labour market. The integration of persons with disabilities into the regular labour market should be actively supported by States.



21. The “right of everyone to the opportunity to gain his living by work which he freely chooses or accepts” (art. 6 (1)) is not realized where the only real opportunity open to disabled workers is to work in so-called “sheltered” facilities under sub-standard conditions.

Arrangements whereby persons with a certain category of disability are effectively confined to certain occupations or to the production of certain goods may violate this right. Similarly, in the light of principle 13 (3) of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care,<sup>20</sup> “therapeutical treatment” in institutions which amounts to forced labour is also incompatible with the Covenant. In this regard, the prohibition on forced labour contained in the International Covenant on Civil and Political Rights is also of potential relevance.

22. According to the Standard Rules, persons with disabilities, whether in rural or urban areas, must have equal opportunities for productive and gainful employment in the labour market.<sup>21</sup> For this to happen it is particularly important that artificial barriers to integration in general, and to employment in particular, be removed. As the International Labour Organization has noted, it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed.<sup>22</sup> For example, as long as workplaces are designed and built in ways that make them inaccessible to wheelchairs, employers will be able to “justify” their failure to employ wheelchair users. Governments should also develop policies which promote and regulate flexible and alternative work arrangements that reasonably accommodate the needs of disabled workers.

23. Similarly, the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant.

24. The “technical and vocational guidance and training programmes” required under article 6 (2) of the Covenant should reflect the needs of all persons with disabilities, take place in integrated settings, and be planned and implemented with the full involvement of representatives of persons with disabilities.

25. The right to “the enjoyment of just and favourable conditions of work” (art. 7) applies to all disabled workers, whether they work in sheltered facilities or in the open labour market. Disabled workers may not be discriminated against with respect to wages or other conditions if their work is equal to that of non-disabled workers. States parties have a responsibility to ensure that disability is not used as an excuse for creating low standards of labour protection or for paying below minimum wages.

26. Trade union-related rights (art. 8) apply equally to workers with disabilities and regardless of whether they work in special work facilities or in the open labour market. In addition, article 8, read in conjunction with other rights such as the right to freedom of association, serves to emphasize the importance of the right of persons with disabilities to form their own

organizations. If these organizations are to be effective in “the promotion and protection of [the] economic and social interests” (art. 8 (1) (a)) of such persons, they should be consulted regularly by government bodies and others in relation to all matters affecting them; it may also be necessary that they be supported financially and otherwise so as to ensure their viability.

27. The International Labour Organization has developed valuable and comprehensive instruments with respect to the work-related rights of persons with disabilities, including in particular Convention No. 159 (1983) concerning vocational rehabilitation and employment of persons with disabilities.<sup>23</sup> The Committee encourages States parties to the Covenant to consider ratifying that Convention.

### **C. Article 9: Social security**

28. Social security and income-maintenance schemes are of particular importance for persons with disabilities. As stated in the Standard Rules, “States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities”.<sup>24</sup> Such support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals (who are overwhelmingly female) who undertake the care of a person with disabilities. Such persons, including members of the families of persons with disabilities, are often in urgent need of financial support because of their assistance role.<sup>25</sup>

29. Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.

### **D. Article 10: Protection of the family and of mothers and children**

30. In the case of persons with disabilities, the Covenant’s requirement that “protection and assistance” be rendered to the family means that everything possible should be done to enable such persons, when they so wish, to live with their families. Article 10 also implies, subject to the general principles of international human rights law, the right of persons with disabilities to marry and have their own family. These rights are frequently ignored or denied, especially in the case of persons with mental disabilities.<sup>26</sup> In this and other contexts, the term “family” should be interpreted broadly and in accordance with appropriate local usage. States parties should ensure that laws and social policies and practices do not impede the realization of these rights. Persons with disabilities should have access to necessary counselling services in order to fulfil their rights and duties within the family.<sup>27</sup>

31. Women with disabilities also have the right to protection and support in relation to motherhood and pregnancy. As the Standard Rules state, “persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood”.<sup>28</sup> The needs and desires in question should be recognized and addressed in both the recreational and the procreational contexts. These rights are commonly denied to both men and

women with disabilities worldwide.<sup>29</sup> Both the sterilization of, and the performance of an abortion on, a woman with disabilities without her prior informed consent are serious violations of article 10 (2).

32. Children with disabilities are especially vulnerable to exploitation, abuse and neglect and are, in accordance with article 10 (3) of the Covenant (reinforced by the corresponding provisions of the Convention on the Rights of the Child), entitled to special protection.

#### **E. Article 11: The right to an adequate standard of living**

33. In addition to the need to ensure that persons with disabilities have access to adequate food, accessible housing and other basic material needs, it is also necessary to ensure that “support services, including assistive devices” are available “for persons with disabilities, to assist them to increase their level of independence in their daily living and to exercise their rights”.<sup>30</sup> The right to adequate clothing also assumes a special significance in the context of persons with disabilities who have particular clothing needs, so as to enable them to function fully and effectively in society. Wherever possible, appropriate personal assistance should also be provided in this connection. Such assistance should be undertaken in a manner and spirit which fully respect the human rights of the person(s) concerned. Similarly, as already noted by the Committee in paragraph 8 of general comment No. 4 (Sixth session, 1991), the right to adequate housing includes the right to accessible housing for persons with disabilities.

#### **F. Article 12: The right to physical and mental health**

34. According to the Standard Rules, “States should ensure that persons with disabilities, particularly infants and children, are provided with the same level of medical care within the same system as other members of society”.<sup>31</sup> The right to physical and mental health also implies the right to have access to, and to benefit from, those medical and social services - including orthopaedic devices - which enable persons with disabilities to become independent, prevent further disabilities and support their social integration.<sup>32</sup> Similarly, such persons should be provided with rehabilitation services which would enable them “to reach and sustain their optimum level of independence and functioning”.<sup>33</sup> All such services should be provided in such a way that the persons concerned are able to maintain full respect for their rights and dignity.

#### **G. Articles 13 and 14: The right to education**

35. School programmes in many countries today recognize that persons with disabilities can best be educated within the general education system.<sup>34</sup> Thus the Standard Rules provide that “States should recognize the principle of equal primary, secondary and tertiary educational opportunities for children, youth and adults with disabilities, in integrated settings”.<sup>35</sup> In order to implement such an approach, States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers. In the case of deaf children, for example, sign language should be recognized as a separate language to which the children should have access and whose importance should be acknowledged in their overall social environment.

**H. Article 15: The right to take part in cultural life  
and enjoy the benefits of scientific progress**

36. The Standard Rules provide that “States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas. ... States should promote the accessibility to and availability of places for cultural performances and services ...”.<sup>36</sup> The same applies to places for recreation, sports and tourism.

37. The right to full participation in cultural and recreational life for persons with disabilities further requires that communication barriers be eliminated to the greatest extent possible. Useful measures in this regard might include “the use of talking books, papers written in simple language and with clear format and colours for persons with mental disability, [and] adapted television and theatre for deaf persons”.<sup>37</sup>

38. In order to facilitate the equal participation in cultural life of persons with disabilities, Governments should inform and educate the general public about disability. In particular, measures must be taken to dispel prejudices or superstitious beliefs against persons with disabilities, for example those that view epilepsy as a form of spirit possession or a child with disabilities as a form of punishment visited upon the family. Similarly, the general public should be educated to accept that persons with disabilities have as much right as any other person to make use of restaurants, hotels, recreation centres and cultural venues.

**Notes**

<sup>1</sup> For a comprehensive review of the question, see the final report prepared by Mr. Leandro Despouy, Special Rapporteur, on human rights and disability (E/CN.4/Sub.2/1991/31).

<sup>2</sup> See A/47/415, paragraph 5.

<sup>3</sup> See paragraph 165 of the World Programme of Action concerning Disabled Persons, adopted by the General Assembly by its resolution 37/52 of 3 December 1982 (para. 1).

<sup>4</sup> See Commission on Human Rights resolutions 1992/48, paragraph 4 and 1993/29, paragraph 7.

<sup>5</sup> See A/47/415, paragraph 6.

<sup>6</sup> Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (Introduction, para. 17).

<sup>7</sup> World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 1.

- <sup>8</sup> A/C.3/46/4, annex I. Also contained in the Report on the International Meeting on the Roles and Functions of National Coordinating Committees on Disability in Developing Countries, Beijing, 5-11 November 1990 (CSDHA/DDP/NDC/4). See also Economic and Social Council resolution 1991/8 and General Assembly resolution 46/96 of 16 December 1991.
- <sup>9</sup> General Assembly resolution 46/119 of 17 December 1991, annex.
- <sup>10</sup> Standard Rules (see note 6 above), Introduction, paragraph 15.
- <sup>11</sup> See A/47/415, *passim*.
- <sup>12</sup> *Ibid.*, paragraph 5.
- <sup>13</sup> Standard Rules (see note 6 above), Rule 1.
- <sup>14</sup> World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 3.
- <sup>15</sup> See note 8 above.
- <sup>16</sup> See A/47/415, paragraphs 37-38.
- <sup>17</sup> World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 25.
- <sup>18</sup> See E/CN.4/Sub.2/1991/31 (see note 1 above), paragraph 140.
- <sup>19</sup> See A/47/415, paragraphs 35, 46, 74 and 77.
- <sup>20</sup> See note 9 above.
- <sup>21</sup> Standard Rules (see note 6 above), Rule 7.
- <sup>22</sup> See A/CONF.157/PC/61/Add.10, p. 12.
- <sup>23</sup> See also Recommendation No. 99 (1955) concerning vocational rehabilitation of the disabled, and Recommendation No. 168 (1983) concerning vocational rehabilitation and employment of persons with disabilities.
- <sup>24</sup> Standard Rules (see note 6 above), Rule 8, paragraph 1.
- <sup>25</sup> See A/47/415, paragraph 78.
- <sup>26</sup> See E/CN.4/Sub.2/1991/31 (see note 1 above), paragraphs 190 and 193.
- <sup>27</sup> See the World Programme of Action concerning Disabled Persons (see note 3 above), paragraph 74.

- <sup>28</sup> Standard Rules (see note 6 above), Rule 9, paragraph 2.
- <sup>29</sup> See E/CN.6/1991/2, paragraphs 14 and 59-68.
- <sup>30</sup> Standard Rules (see note 6 above), Rule 4.
- <sup>31</sup> *Ibid.*, Rule 2, paragraph 3.
- <sup>32</sup> See the Declaration on the Rights of Disabled Persons (General Assembly resolution 3447 (XXX) of 9 December 1975), paragraph 6; and the World Programme of Action concerning Disabled Persons (see note 3 above), paragraphs 95-107.
- <sup>33</sup> Standard Rules (see note 6 above), Rule 3.
- <sup>34</sup> See A/47/415, paragraph 73.
- <sup>35</sup> Standard Rules (see note 6 above), Rule 6.
- <sup>36</sup> *Ibid.*, Rule 10, paragraphs 1-2.
- <sup>37</sup> See A/47/415, paragraph 79.

### **Thirteenth session (1995)\***

#### **General comment No. 6: The economic, social and cultural rights of older persons**

##### **1. Introduction**

1. The world population is ageing at a steady, quite spectacular rate. The total number of persons aged 60 and above rose from 200 million in 1950 to 400 million in 1982 and is projected to reach 600 million in the year 2001 and 1.2 billion by the year 2025, at which time over 70 per cent of them will be living in what are today's developing countries. The number of people aged 80 and above has grown and continues to grow even more dramatically, going from 13 million in 1950 to over 50 million today and projected to increase to 137 million in 2025. This is the fastest growing population group in the world, projected to increase by a factor of 10 between 1950 and 2025, compared with a factor of 6 for the group aged 60 and above and a factor of little more than 3 for the total population.<sup>1</sup>

2. These figures are illustrations of a quiet revolution, but one which has far-reaching and unpredictable consequences and which is now affecting the social and economic structures of societies both at the world level and at the country level, and will affect them even more in future.

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\* Contained in document E/1996/22.

3. Most of the States parties to the Covenant, and the industrialized countries in particular, are faced with the task of adapting their social and economic policies to the ageing of their populations, especially as regards social security. In the developing countries, the absence or deficiencies of social security coverage are being aggravated by the emigration of the younger members of the population and the consequent weakening of the traditional role of the family, the main support of older people.

## **2. Internationally endorsed policies in relation to older persons**

4. In 1982 the World Assembly on Ageing adopted the Vienna International Plan of Action on Ageing. This important document was endorsed by the General Assembly and is a very useful guide, for it details the measures that should be taken by Member States to safeguard the rights of older persons within the context of the rights proclaimed by the International Covenants on Human Rights. It contains 62 recommendations, many of which are of direct relevance to the Covenant.<sup>2</sup>

5. In 1991 the General Assembly adopted the United Nations Principles for Older Persons which, because of their programmatic nature, is also an important document in the present context.<sup>3</sup> It is divided into five sections which correlate closely to the rights recognized in the Covenant. "*Independence*" includes access to adequate food, water, shelter, clothing and health care. To these basic rights are added the opportunity to remunerated work and access to education and training. By "*participation*" is meant that older persons should participate actively in the formulation and implementation of policies that affect their well-being and share their knowledge and skills with younger generations, and should be able to form movements and associations. The section headed "*Care*" proclaims that older persons should benefit from family care, health care and be able to enjoy human rights and fundamental freedoms when residing in a shelter, care or treatment facility. With regard to "*self-fulfilment*", the principles that older persons should pursue opportunities for the full development of their potential through access to the educational, cultural, spiritual and recreational resources of their societies. Lastly, the section entitled "*dignity*" states that older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse, should be treated fairly, regardless of age, gender, racial or ethnic background, disability, financial situation or any other status, and be valued independently of their economic contribution.

6. In 1992, the General Assembly adopted eight global targets on ageing for the year 2001 and a brief guide for setting national targets. In a number of important respects, these global targets serve to reinforce the obligations of States parties to the Covenant.<sup>4</sup>

7. Also in 1992, and in commemoration of the tenth anniversary of the adoption of the Vienna International Plan of Action by the Conference on Ageing, the General Assembly adopted the Proclamation on Ageing in which it urged support of national initiatives on ageing so that older women are given adequate support for their largely unrecognized contributions to society and older men are encouraged to develop social, cultural and emotional capacities which they may have been prevented from developing during breadwinning years; families are supported in providing care and all family members encouraged to cooperate in care giving;

and that international cooperation is expanded in the context of the strategies for reaching the global targets on ageing for the year 2001. It also proclaimed the year 1999 as the International Year of Older Persons in recognition of humanity's demographic "coming of age".<sup>5</sup>

8. The United Nations specialized agencies, especially the International Labour Organization, have also given attention to the problem of ageing in their respective fields of competence.

### **3. The rights of older persons in relation to the International Covenant on Economic, Social and Cultural Rights**

9. The terminology used to describe older persons varies considerably, even in international documents. It includes: "older persons", "the aged", "the elderly", "the third age", "the ageing", and, to denote persons more than 80 years of age, "the fourth age". The Committee opted for "older persons" (in French, *personnes âgées*; in Spanish, *personas mayores*), the term employed in General Assembly resolutions 47/5 and 48/98. According to the practice in the United Nations statistical services, these terms cover persons aged 60 and above (Eurostat, the statistical service of the European Union, considers "older persons" to mean persons aged 65 or above, since 65 is the most common age of retirement and the trend is towards later retirement still).

10. The International Covenant on Economic, Social and Cultural Rights does not contain any explicit reference to the rights of older persons, although article 9 dealing with "the right of everyone to social security, including social insurance", implicitly recognizes the right to old-age benefits. Nevertheless, in view of the fact that the Covenant's provisions apply fully to all members of society, it is clear that older persons are entitled to enjoy the full range of rights recognized in the Covenant. This approach is also fully reflected in the Vienna International Plan of Action on Ageing. Moreover, insofar as respect for the rights of older persons requires special measures to be taken, States parties are required by the Covenant to do so to the maximum of their available resources.

11. Another important issue is whether discrimination on the basis of age is prohibited by the Covenant. Neither the Covenant nor the Universal Declaration of Human Rights refers explicitly to age as one of the prohibited grounds. Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now.

12. This is not determinative of the matter, however, since the prohibition of discrimination on the grounds of "other status" could be interpreted as applying to age. The Committee notes that while it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited. Moreover, it must be emphasized that the unacceptableness of discrimination against older persons is underlined in many international policy documents and is confirmed in the legislation of the vast majority of States. In the few areas in which discrimination continues to be tolerated, such as in relation to mandatory retirement ages or access to tertiary education, there is a clear trend towards the elimination of such barriers. The Committee is of the view that States parties should seek to expedite this trend to the greatest extent possible.



13. Accordingly, the Committee on Economic, Social and Cultural Rights is of the view that States parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons. The Committee's own role in this regard is rendered all the more important by the fact that, unlike the case of other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area.

14. By the end of its thirteenth session, the Committee and, before that, its predecessor, the Sessional Working Group of Governmental Experts, had examined 144 initial reports, 70 second periodic reports and 20 initial and periodic global reports on articles 1 to 15. This examination made it possible to identify many of the problems that may be encountered in implementing the Covenant in a considerable number of States parties that represent all the regions of the world and have different political, socio-economic and cultural systems. The reports examined to date have not provided any information in a systematic way on the situation of older persons with regard to compliance with the Covenant, apart from information, of varying completeness, on the implementation of article 9 relating to the right to social security.

15. In 1993, the Committee devoted a day of general discussion to this issue in order to plan its future activity in this area. Moreover, it has, at recent sessions, begun to attach substantially more importance to information on the rights of older persons and its questioning has elicited some very valuable information in some instances. Nevertheless, the Committee notes that the great majority of States parties reports continue to make little reference to this important issue. It therefore wishes to indicate that, in future, it will insist that the situation of older persons in relation to each of the rights recognized in the Covenant should be adequately addressed in all reports. The remainder of this general comment identifies the specific issues which are relevant in this regard.

#### **4. General obligations of States parties**

16. Older persons as a group are as heterogeneous and varied as the rest of the population and their situation depends on a country's economic and social situation, on demographic, environmental, cultural and employment factors and, at the individual level, on the family situation, the level of education, the urban or rural environment and the occupation of workers and retirees.

17. Side by side with older persons who are in good health and whose financial situation is acceptable, there are many who do not have adequate means of support, even in developed countries, and who feature prominently among the most vulnerable, marginal and unprotected groups. In times of recession and of restructuring of the economy, older persons are particularly at risk. As the Committee has previously stressed (general comment No. 3 (1990), para. 12), even in times of severe resource constraints, States parties have the duty to protect the vulnerable members of society.

18. The methods that States parties use to fulfil the obligations they have assumed under the Covenant in respect of older persons will be basically the same as those for the fulfilment of other obligations (see general comment No. 1 (1989)). They include the need to determine the

nature and scope of problems within a State through regular monitoring, the need to adopt properly designed policies and programmes to meet requirements, the need to enact legislation when necessary and to eliminate any discriminatory legislation and the need to ensure the relevant budget support or, as appropriate, to request international cooperation. In the latter connection, international cooperation in accordance with articles 22 and 23 of the Covenant may be a particularly important way of enabling some developing countries to fulfil their obligations under the Covenant.

19. In this context, attention may be drawn to Global target No. 1, adopted by the General Assembly in 1992, which calls for the establishment of national support infrastructures to promote policies and programmes on ageing in national and international development plans and programmes. In this regard, the Committee notes that one of the United Nations Principles for Older Persons which Governments were encouraged to incorporate into their national programmes is that older persons should be able to form movements or associations of older persons.

## **5. Specific provisions of the Covenant**

### **Article 3: Equal rights of men and women**

20. In accordance with article 3 of the Covenant, by which States parties undertake “to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights”, the Committee considers that States parties should pay particular attention to older women who, because they have spent all or part of their lives caring for their families without engaging in a remunerated activity entitling them to an old-age pension, and who are also not entitled to a widow’s pension, are often in critical situations.

21. To deal with such situations and comply fully with article 9 of the Covenant and paragraph 2 (h) of the Proclamation on Ageing, States parties should institute non-contributory old-age benefits or other assistance for all persons, regardless of their sex, who find themselves without resources on attaining an age specified in national legislation. Given their greater life expectancy and the fact that it is more often they who have no contributory pensions, women would be the principal beneficiaries.

### **Articles 6 to 8: Rights relating to work**

22. Article 6 of the Covenant requires States parties to take appropriate steps to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted. In this regard, the Committee, bearing in mind that older workers who have not reached retirement age often encounter problems in finding and keeping jobs, stresses the need for measures to prevent discrimination on grounds of age in employment and occupation.<sup>6</sup>

23. The right “to the enjoyment of just and favourable conditions of work” (Covenant, art. 7) is of special importance for ensuring that older workers enjoy safe working conditions until their retirement. In particular, it is desirable, to employ older workers in circumstances in which the best use can be made of their experience and know-how.<sup>7</sup>

24. In the years preceding retirement, retirement preparation programmes should be implemented, with the participation of representative organizations of employers and workers and other bodies concerned, to prepare older workers to cope with their new situation. Such programmes should, in particular, provide older workers with information about: their rights and obligations as pensioners; the opportunities and conditions for continuing an occupational activity or undertaking voluntary work; means of combating detrimental effects of ageing; facilities for adult education and cultural activities, and the use of leisure time.<sup>8</sup>

25. The rights protected by article 8 of the Covenant, namely, trade union rights, including after retirement age, must be applied to older workers.

### **Article 9: Right to social security**

26. Article 9 of the Covenant provides generally that States parties “recognize the right of everyone to social security”, without specifying the type or level of protection to be guaranteed. However, the term “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control.

27. In accordance with article 9 of the Covenant and the provisions concerning implementation of the ILO social security conventions - Convention No. 102 concerning Social Security (Minimum Standards) (1952) and Convention No. 128 concerning Invalidity, Old-Age and Survivors’ Benefits (1967) - States parties must take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law.

28. In keeping with the recommendations contained in the two ILO Conventions mentioned above and Recommendation No. 162, the Committee invites States parties to establish retirement age so that it is flexible, depending on the occupations performed and the working ability of elderly persons, with due regard to demographic, economic and social factors.

29. In order to give effect to the provisions of article 9 of the Covenant, States parties must guarantee the provision of survivors’ and orphans’ benefits on the death of the breadwinner who was covered by social security or receiving a pension.

30. Furthermore, as already observed in paragraphs 20 and 21, in order fully to implement the provisions of article 9 of the Covenant, States parties should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.

### **Article 10: Protection of the family**

31. On the basis of article 10, paragraph 1, of the Covenant and recommendations 25 and 29 of the Vienna International Plan of Action on Ageing, States parties should make all the necessary efforts to support, protect and strengthen the family and help it, in accordance with each society’s system of cultural values, to respond to the needs of its dependent ageing members.

Recommendation 29 encourages Governments and non-governmental organizations to establish social services to support the whole family when there are elderly people at home and to implement measures especially for low-income families who wish to keep elderly people at home. This assistance should also be provided for persons living alone or elderly couples wishing to remain at home.

### **Article 11: Right to an adequate standard of living**

32. Of the United Nations Principles for Older Persons, principle 1, which stands at the beginning of the section relating to the independence of older persons, provides that: “Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help”. The Committee attaches great importance to this principle, which demands for older persons the rights contained in article 11 of the Covenant.

33. Recommendations 19 to 24 of the Vienna International Plan of Action on Ageing emphasize that housing for the elderly must be viewed as more than mere shelter and that, in addition to the physical, it has psychological and social significance which should be taken into account. Accordingly, national policies should help elderly persons to continue to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of those persons to gain access to and use them (recommendation 19). Recommendation 20 stresses the need for urban rebuilding and development planning and law to pay special attention to the problems of the ageing, assisting in securing their social integration, while recommendation 22 draws attention to the need to take account of the functional capacity of the elderly in order to provide them with a better living environment and facilitate mobility and communication through the provision of adequate means of transport.

### **Article 12: Right to physical and mental health**

34. With a view to the realization of the right of elderly persons to the enjoyment of a satisfactory standard of physical and mental health, in accordance with article 12, paragraph 1, of the Covenant, States parties should take account of the content of recommendations 1 to 17 of the Vienna International Plan of Action on Ageing, which focus entirely on providing guidelines on health policy to preserve the health of the elderly and take a comprehensive view, ranging from prevention and rehabilitation to the care of the terminally ill.

35. Clearly, the growing number of chronic, degenerative diseases and the high hospitalization costs they involve cannot be dealt with only by curative treatment. In this regard, States parties should bear in mind that maintaining health into old age requires investments during the entire life span, basically through the adoption of healthy lifestyles (food, exercise, elimination of tobacco and alcohol, etc.). Prevention, through regular checks suited to the needs of the elderly, plays a decisive role, as does rehabilitation, by maintaining the functional capacities of elderly persons, with a resulting decrease in the cost of investments in health care and social services.

### **Articles 13 to 15: Right to education and culture**

36. Article 13, paragraph 1, of the Covenant recognizes the right of everyone to education. In the case of the elderly, this right must be approached from two different and complementary points of view: (a) the right of elderly persons to benefit from educational programmes; and (b) making the know-how and experience of elderly persons available to younger generations.

37. With regard to the former, States parties should take account of: (a) the recommendations in principle 16 of the United Nations Principles for Older Persons to the effect that older persons should have access to suitable education programmes and training and should, therefore, on the basis of their preparation, abilities and motivation, be given access to the various levels of education through the adoption of appropriate measures regarding literacy training, life-long education, access to university, etc.; and (b) recommendation 47 of the Vienna International Plan of Action on Ageing, which, in accordance with the concept of life-long education promulgated by the United Nations Educational, Scientific and Cultural Organization (UNESCO), recommends informal, community-based and recreation-oriented programmes for the elderly in order to develop their sense of self-reliance and the community's sense of responsibility. Such programmes should enjoy the support of national Governments and international organizations.

38. With regard to the use of the know-how and experience of older persons, as referred to in the part of the recommendations of the Vienna International Plan of Action on Ageing dealing with education (paras. 74-76), attention is drawn to the important role that elderly and old persons still play in most societies as the transmitters of information, knowledge, traditions and spiritual values and to the fact that this important tradition should not be lost. Consequently, the Committee attaches particular importance to the message contained in recommendation 44 of the Plan: "Educational programmes featuring the elderly as the teachers and transmitters of knowledge, culture and spiritual values should be developed".

39. In article 15, paragraphs 1 (a) and (b), of the Covenant, States parties recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress and its applications. In this respect, the Committee urges States parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7: "Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations"; and principle 16: "Older persons should have access to the educational, cultural, spiritual and recreational resources of society".

40. Similarly, recommendation 48 of the Vienna International Plan of Action on Ageing encourages Governments and international organizations to support programmes aimed at providing the elderly with easier physical access to cultural institutions (museums, theatres, concert halls, cinemas, etc.).

41. Recommendation 50 stresses the need for Governments, non-governmental organizations and the ageing themselves to make efforts to overcome negative stereotyped images of older persons as suffering from physical and psychological disabilities, incapable of functioning independently and having neither role nor status in society. These efforts, in which the media and educational institutions should also take part, are essential for achieving a society that champions the full integration of the elderly.

42. With regard to the right to enjoy the benefits of scientific progress and its applications, States parties should take account of recommendations 60, 61 and 62 of the Vienna International Plan of Action and make efforts to promote research on the biological, mental and social aspects of ageing and ways of maintaining functional capacities and preventing and delaying the start of chronic illnesses and disabilities. In this connection, it is recommended that States, intergovernmental organizations and non-governmental organizations should establish institutions specializing in the teaching of gerontology, geriatrics and geriatric psychology in countries where such institutions do not exist.

### Notes

<sup>1</sup> Global targets on ageing for the year 2001: a practical strategy. Report of the Secretary-General (A/47/339), paragraph 5.

<sup>2</sup> *Report of the World Assembly on Ageing*, Vienna, 26 July-6 August 1982; (United Nations publication, Sales No. E.82.I.16).

<sup>3</sup> General Assembly resolution 46/91 of 16 December 1991, "Implementation of the International Plan of Action on Ageing and related activities", annex.

<sup>4</sup> Global targets on ageing for the year 2001: a practical strategy (A/47/339), chapters III and IV.

<sup>5</sup> General Assembly resolution 47/5 of 16 October 1992, "Proclamation on Ageing".

<sup>6</sup> See ILO Recommendation 162 (1980) concerning Older Workers, paragraphs 3-10.

<sup>7</sup> *Ibid.*, paragraphs 11-19.

<sup>8</sup> *Ibid.*, paragraph 30.

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**Sixteenth session (1997)\***

**General comment No. 7: The right to adequate housing  
(art. 11 (1) of the Covenant): Forced evictions**

1. In its general comment No. 4 (1991), the Committee observed that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. It concluded that forced evictions are *prima facie* incompatible with the requirements of the Covenant. Having considered a significant number of reports of forced evictions in recent years, including instances in which it has determined that the obligations of States parties were being violated, the Committee is now in a position to seek to provide further clarification as to the implications of such practices in terms of the obligations contained in the Covenant.
2. The international community has long recognized that the issue of forced evictions is a serious one. In 1976, the United Nations Conference on Human Settlements noted that special attention should be paid to “undertaking major clearance operations should take place only when conservation and rehabilitation are not feasible and relocation measures are made”.<sup>1</sup> In 1988, in the Global Strategy for Shelter to the Year 2000, adopted by the General Assembly in its resolution 43/181, the “fundamental obligation [of Governments] to protect and improve houses and neighbourhoods, rather than damage or destroy them” was recognized.<sup>2</sup> Agenda 21 stated that “people should be protected by law against unfair eviction from their homes or land”.<sup>3</sup> In the Habitat Agenda Governments committed themselves to “protecting all people from, and providing legal protection and redress for, forced evictions that are contrary to the law, taking human rights into consideration; [and] when evictions are unavoidable, ensuring, as appropriate, that alternative suitable solutions are provided”.<sup>4</sup> The Commission on Human Rights has also indicated that “forced evictions are a gross violation of human rights”.<sup>5</sup> However, although these statements are important, they leave open one of the most critical issues, namely that of determining the circumstances under which forced evictions are permissible and of spelling out the types of protection required to ensure respect for the relevant provisions of the Covenant.
3. The use of the term “forced evictions” is, in some respects, problematic. This expression seeks to convey a sense of arbitrariness and of illegality. To many observers, however, the reference to “forced evictions” is a tautology, while others have criticized the expression “illegal evictions” on the ground that it assumes that the relevant law provides adequate protection of the right to housing and conforms with the Covenant, which is by no means always the case. Similarly, it has been suggested that the term “unfair evictions” is even more subjective by virtue of its failure to refer to any legal framework at all. The international community, especially in the context of the Commission on Human Rights, has opted to refer to “forced evictions”, primarily since all suggested alternatives also suffer from many such defects. The term “forced evictions” as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or

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\* Contained in document E/1998/22, annex IV.

other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.

4. The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.

5. Although the practice of forced evictions might appear to occur primarily in heavily populated urban areas, it also takes place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflict, mass exoduses and refugee movements. In all of these contexts, the right to adequate housing and not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to States parties. Even in situations where it may be necessary to impose limitations on such a right, full compliance with article 4 of the Covenant is required so that any limitations imposed must be “determined by law only insofar as this may be compatible with the nature of these [i.e. economic, social and cultural] rights and solely for the purpose of promoting the general welfare in a democratic society”.

6. Many instances of forced eviction are associated with violence, such as evictions resulting from international armed conflicts, internal strife and communal or ethnic violence.

7. Other instances of forced eviction occur in the name of development. Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large-scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.

8. In essence, the obligations of States parties to the Covenant in relation to forced evictions are based on article 11.1, read in conjunction with other relevant provisions. In particular, article 2.1 obliges States to use “all appropriate means” to promote the right to adequate housing. However, in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions (as defined in paragraph 3 above). Moreover, this approach is reinforced by article 17.1 of the International Covenant on Civil and Political Rights which complements the right not to be forcefully evicted without adequate protection. That provision recognizes, *inter alia*, the right to be protected against “arbitrary or unlawful interference” with one’s home. It is to be noted that the State’s obligation to ensure respect for that right is not qualified by considerations relating to its available resources.

9. Article 2.1 of the Covenant requires States parties to use “all appropriate means”, including the adoption of legislative measures, to promote all the rights protected under the Covenant. Although the Committee has indicated in its general comment No. 3 (1990) that such measures may not be indispensable in relation to all rights, it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must also apply to all agents acting under the authority of the State or who are accountable to it. Moreover, in view of the increasing trend in some States towards the Government greatly reducing its responsibilities in the housing sector, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.

10. Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless. The non-discrimination provisions of articles 2.2 and 3 of the Covenant impose an additional obligation upon Governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved.

11. Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected.

12. Forced eviction and house demolition as a punitive measure are also inconsistent with the norms of the Covenant. Likewise, the Committee takes note of the obligations enshrined in the Geneva Conventions of 1949 and Protocols thereto of 1977 concerning prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced eviction.

13. States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall

article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”.

14. In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality. In this regard it is especially pertinent to recall general comment No. 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person’s home can only take place “in cases envisaged by the law”. The Committee observed that the law “should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”. The Committee also indicated that “relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted”.

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.

17. The Committee is aware that various development projects financed by international agencies within the territories of State parties have resulted in forced evictions. In this regard, the Committee recalls its general comment No. 2 (1990) which states, inter alia, that “international agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account”.<sup>6</sup>

18. Some institutions, such as the World Bank and the Organisation for Economic Cooperation and Development (OECD) have adopted guidelines on relocation and/or resettlement with a view to limiting the scale of and human suffering associated with forced evictions. Such practices often accompany large-scale development projects, such as dam-building and other major energy projects. Full respect for such guidelines, insofar as they reflect the obligations contained in the Covenant, is essential on the part of both the agencies themselves and States parties to the Covenant. The Committee recalls in this respect the statement in the Vienna Declaration and Programme of Action to the effect that “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights” (Part I, para. 10).

19. In accordance with the guidelines for reporting adopted by the Committee, State parties are requested to provide various types of information pertaining directly to the practice of forced evictions. This includes information relating to (a) the “number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction”, (b) “legislation concerning the rights of tenants to security of tenure, to protection from eviction” and (c) “legislation prohibiting any form of eviction”.<sup>7</sup>

20. Information is also sought as to “measures taken during, inter alia, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics and other sporting competitions, exhibitions, conferences, etc.) ‘beautiful city’ campaigns, etc. which guarantee protection from eviction or guarantee rehousing based on mutual consent, by any persons living on or near to affected sites”.<sup>8</sup> However, few States parties have included the requisite information in their reports to the Committee. The Committee therefore wishes to emphasize the importance it attaches to the receipt of such information.

21. Some States parties have indicated that information of this nature is not available. The Committee recalls that effective monitoring of the right to adequate housing, either by the Government concerned or by the Committee, is not possible in the absence of the collection of appropriate data and would request all States parties to ensure that the necessary data is collected and is reflected in the reports submitted by them under the Covenant.

### Notes

<sup>1</sup> Report of Habitat: United Nations Conference on Human Settlements, Vancouver, 31 May-11 June 1976 (A/CONF.70/15), chap. II, recommendation B.8, paragraph C (ii).

<sup>2</sup> Report of the Commission on Human Settlements on the work of its eleventh session, Addendum (A/43/8/Add.1), paragraph 13.

<sup>3</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, volume I (A/CONF.151/26/Rev.1 (vol. I), annex II, Agenda 21, chapter 7.9 (b)).

<sup>4</sup> Report of the United Nations Conference on Settlements (Habitat II) (A/CONF.165/14), annex II, The Habitat Agenda, paragraph 40 (n).

<sup>5</sup> Commission on Human Rights resolution 1993/77, paragraph 1.

<sup>6</sup> E/1990/23, annex III, paragraphs 6 and 8 (d).

<sup>7</sup> E/C.12/1999/8, annex IV.

<sup>8</sup> Ibid.

### **Seventeenth session (1997)\***

#### **General comment No. 8: The relationship between economic sanctions and respect for economic, social and cultural rights**

1. Economic sanctions are being imposed with increasing frequency, both internationally, regionally and unilaterally. The purpose of this general comment is to emphasize that, whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights. The Committee does not in any way call into question the necessity for the imposition of sanctions in appropriate cases in accordance with Chapter VII of the Charter of the United Nations or other applicable international law. But those provisions of the Charter that relate to human rights (arts. 1, 55 and 56) must still be considered to be fully applicable in such cases.

2. During the 1990s the Security Council has imposed sanctions of varying kind and duration in relation to South Africa, Iraq/Kuwait, parts of the former Yugoslavia, Somalia, the Libyan Arab Jamahiriya, Liberia, Haiti, Angola, Rwanda and the Sudan. The impact of sanctions upon the enjoyment of economic, social and cultural rights has been brought to the Committee's attention in a number of cases involving States parties to the Covenant, some of which have reported regularly, thereby giving the Committee the opportunity to examine the situation carefully.

3. While the impact of sanctions varies from one case to another, the Committee is aware that they almost always have a dramatic impact on the rights recognized in the Covenant. Thus, for example, they often cause significant disruption in the distribution of food, pharmaceuticals and sanitation supplies, jeopardize the quality of food and the availability of clean drinking water, severely interfere with the functioning of basic health and education systems, and undermine the right to work. In addition, their unintended consequences can include reinforcement of the power of oppressive elites, the emergence, almost invariably, of a black market and the generation of huge windfall profits for the privileged elites which manage it, enhancement of the control of the

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\* Contained in document E/1998/22.

governing elite over the population at large, and restriction of opportunities to seek asylum or to manifest political opposition. While the phenomena mentioned in the preceding sentence are essentially political in nature, they also have a major additional impact on the enjoyment of economic, social and cultural rights.

4. In considering sanctions, it is essential to distinguish between the basic objective of applying political and economic pressure upon the governing elite of the country to persuade them to conform to international law, and the collateral infliction of suffering upon the most vulnerable groups within the targeted country. For that reason, the sanctions regimes established by the Security Council now include humanitarian exemptions designed to permit the flow of essential goods and services destined for humanitarian purposes. It is commonly assumed that these exemptions ensure basic respect for economic, social and cultural rights within the targeted country.

5. However, a number of recent United Nations and other studies which have analysed the impact of sanctions have concluded that these exemptions do not have this effect. Moreover, the exemptions are very limited in scope. They do not address, for example, the question of access to primary education, nor do they provide for repairs to infrastructures which are essential to provide clean water, adequate health care etc. The Secretary-General suggested in 1995 that there is a need to assess the potential impact of sanctions before they are imposed and to enhance arrangements for the provision of humanitarian assistance to vulnerable groups.<sup>1</sup> In the following year, a major study prepared for the General Assembly by Ms. Graça Machel, on the impact of armed conflict on children, stated that “humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently. ... Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages. ... [Their effects] inevitably fall most heavily on the poor”.<sup>2</sup> Most recently, an October 1997 United Nations report concluded that the review procedures established under the various sanctions committees established by the Security Council “remain cumbersome and aid agencies still encounter difficulties in obtaining approval for exempted supplies. ... [The] committees neglect larger problems of commercial and governmental violations in the form of black-marketing, illicit trade, and corruption”.<sup>3</sup>

6. It is thus clear, on the basis of an impressive array of both country-specific and general studies, that insufficient attention is being paid to the impact of sanctions on vulnerable groups. Nevertheless, for various reasons, these studies have not examined specifically the nefarious consequences that ensue for the enjoyment of economic, social and cultural rights, per se. It is in fact apparent that in most, if not all, cases, those consequences have either not been taken into account at all or not given the serious consideration they deserve. There is thus a need to inject a human rights dimension into deliberations on this issue.

7. The Committee considers that the provisions of the Covenant, virtually all of which are also reflected in a range of other human rights treaties as well as the Universal Declaration of Human Rights, cannot be considered to be inoperative, or in any way inapplicable, solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions. Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State (see also general comment No. 3 (1990), para. 10).

8. While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it. Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...”. When the affected State is also a State party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.

9. Although the Committee has no role to play in relation to decisions to impose or not to impose sanctions, it does, however, have a responsibility to monitor compliance by all States parties with the Covenant. When measures are taken which inhibit the ability of a State party to meet its obligations under the Covenant, the terms of sanctions and the manner in which they are implemented become appropriate matters for concern for the Committee.

10. The Committee believes that two sets of obligations flow from these considerations. The first set relates to the affected State. The imposition of sanctions does not in any way nullify or diminish the relevant obligations of that State party. As in other comparable situations, those obligations assume greater practical importance in times of particular hardship. The Committee is thus called upon to scrutinize very carefully the extent to which the State concerned has taken steps “to the maximum of its available resources” to provide the greatest possible protection for the economic, social and cultural rights of each individual living within its jurisdiction. While sanctions will inevitably diminish the capacity of the affected State to fund or support some of the necessary measures, the State remains under an obligation to ensure the absence of discrimination in relation to the enjoyment of these rights, and to take all possible measures, including negotiations with other States and the international community, to reduce to a minimum the negative impact upon the rights of vulnerable groups within the society.

11. The second set of obligations relates to the party or parties responsible for the imposition, maintenance or implementation of the sanctions, whether it be the international community, an international or regional organization, or a State or group of States. In this respect, the Committee considers that there are three conclusions which follow logically from the recognition of economic, social and cultural human rights.

12. First, these rights must be taken fully into account when designing an appropriate sanctions regime. Without endorsing any particular measures in this regard, the Committee notes proposals such as those calling for the creation of a United Nations mechanism for anticipating and tracking sanctions impacts, the elaboration of a more transparent set of agreed principles and procedures based on respect for human rights, the identification of a wider range of exempt



goods and services, the authorization of agreed technical agencies to determine necessary exemptions, the creation of a better resourced set of sanctions committees, more precise targeting of the vulnerabilities of those whose behaviour the international community wishes to change, and the introduction of greater overall flexibility.

13. Second, effective monitoring, which is always required under the terms of the Covenant, should be undertaken throughout the period that sanctions are in force. When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social and cultural rights of the affected population.

14. Third, the external entity has an obligation “to take steps, individually and through international assistance and cooperation, especially economic and technical” in order to respond to any disproportionate suffering experienced by vulnerable groups within the targeted country.

15. In anticipating the objection that sanctions must, almost by definition, result in the grave violation of economic, social and cultural rights if they are to achieve their objectives, the Committee notes the conclusion of a major United Nations study to the effect that “decisions to reduce the suffering of children or minimize other adverse consequences can be taken without jeopardizing the policy aim of sanctions.<sup>4</sup> This applies equally to the situation of all vulnerable groups.

16. In adopting this general comment the sole aim of the Committee is to draw attention to the fact that the inhabitants of a given country do not forfeit their basic economic, social and cultural rights by virtue of any determination that their leaders have violated norms relating to international peace and security. The aim is not to give support or encouragement to such leaders, nor is it to undermine the legitimate interests of the international community in enforcing respect for the provisions of the Charter of the United Nations and the general principles of international law. Rather, it is to insist that lawlessness of one kind should not be met by lawlessness of another kind which pays no heed to the fundamental rights that underlie and give legitimacy to any such collective action.

### Notes

<sup>1</sup> Supplement to an Agenda for Peace, (A/50/60-S/1995/1), paragraphs 66 to 76.

<sup>2</sup> Impact of Armed Conflict on children: Note by the Secretary-General (A/51/306, annex) (1996), paragraph 128.

<sup>3</sup> L. Minear, et al., *Toward More Humane and Effective Sanctions Management: Enhancing the Capacity of the United Nations System*, Executive Summary. Study prepared at the request of the United Nations Department of Humanitarian Affairs on behalf of the Inter-agency Standing Committee, 6 October 1997.

<sup>4</sup> *Ibid.*

**Nineteenth session (1998)\***

**General comment No. 9: The domestic application of the Covenant**

**A. The duty to give effect to the Covenant in the domestic legal order**

1. In its general comment No. 3 (1990) on the nature of States parties' obligations (article 2, paragraph 1, of the Covenant)<sup>1</sup> the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.
2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.
3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties,<sup>2</sup> is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights, which obligates States parties to, inter alia, "develop the possibilities of judicial remedy". Nevertheless, a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

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\* Contained in document E/1999/22.

## **B. The status of the Covenant in the domestic legal order**

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see paragraph 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

## **C. The role of legal remedies**

### **Legal or judicial remedies?**

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination,<sup>3</sup> in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

### **Justiciability**

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in general comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

### **Self-executing**

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered

“non-self-executing” were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

#### **D. The treatment of the Covenant in domestic courts**

12. In the Committee’s guidelines for States’ reports, States are requested to provide information as to whether the provisions of the Covenant “can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities”.<sup>4</sup> Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretative standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

## Notes

<sup>1</sup> E/1991/23, annex III.

<sup>2</sup> United Nations, Treaty Series, vol. 1155, p. 331.

<sup>3</sup> Pursuant to article 2, paragraph 2, of the Covenant, States “undertake to guarantee” that the rights therein are exercised “without discrimination of any kind”.

<sup>4</sup> See E/1991/23, annex IV, chapter A, paragraph 1 (d) (iv).

### Nineteenth session (1998)\*

#### **General comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights**

1. Article 2, paragraph 1, of the Covenant obligates each State party “to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means”. The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights. In recent years there has been a proliferation of these institutions and the trend has been strongly encouraged by the General Assembly and the Commission on Human Rights. The Office of the United Nations High Commissioner for Human Rights has established a major programme to assist and encourage States in relation to national institutions.

2. These institutions range from national human rights commissions through Ombudsman offices, public interest or other human rights “advocates”, to “defensores del pueblo”. In many cases, the institution has been established by the Government, enjoys an important degree of autonomy from the executive and the legislature, takes full account of international human rights standards which are applicable to the country concerned, and is mandated to perform various activities designed to promote and protect human rights. Such institutions have been established in States with widely differing legal cultures and regardless of their economic situation.

3. The Committee notes that national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions. The following list is indicative of the types of activities that can be, and in some instances already have been, undertaken by national institutions in relation to these rights:

(a) The promotion of educational and information programmes designed to enhance awareness and understanding of economic, social and cultural rights, both within the population at large and among particular groups such as the public service, the judiciary, the private sector and the labour movement;

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\* Contained in document E/1999/22.

(b) The scrutinizing of existing laws and administrative acts, as well as draft bills and other proposals, to ensure that they are consistent with the requirements of the International Covenant on Economic, Social and Cultural Rights;

(c) Providing technical advice, or undertaking surveys in relation to economic, social and cultural rights, including at the request of the public authorities or other appropriate agencies;

(d) The identification of national-level benchmarks against which the realization of Covenant obligations can be measured;

(e) Conducting research and inquiries designed to ascertain the extent to which particular economic, social and cultural rights are being realized, either within the State as a whole or in areas or in relation to communities of particular vulnerability;

(f) Monitoring compliance with specific rights recognized under the Covenant and providing reports thereon to the public authorities and civil society; and

(g) Examining complaints alleging infringements of applicable economic, social and cultural rights standards within the State.

4. The Committee calls upon States parties to ensure that the mandates accorded to all national human rights institutions include appropriate attention to economic, social and cultural rights and requests States parties to include details of both the mandates and the principal relevant activities of such institutions in their reports submitted to the Committee.

#### **Twentieth session (1999)\***

##### **General comment No. 11: Plans of action for primary education (art. 14)**

1. Article 14 of the International Covenant on Economic, Social and Cultural Rights requires each State party which has not been able to secure compulsory primary education, free of charge, to undertake, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory primary education free of charge for all. In spite of the obligations undertaken in accordance with article 14, a number of States parties have neither drafted nor implemented a plan of action for free and compulsory primary education.

2. The right to education, recognized in articles 13 and 14 of the Covenant, as well as in a variety of other international treaties, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women, is of vital importance. It has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.

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\* Contained in document E/C.12/1999/4.

3. In line with its clear and unequivocal obligation under article 14, every State party is under a duty to present to the Committee a plan of action drawn up along the lines specified in paragraph 8 below. This obligation needs to be scrupulously observed in view of the fact that in developing countries, 130 million children of school age are currently estimated to be without access to primary education, of whom about two thirds are girls.\* The Committee is fully aware that many diverse factors have made it difficult for States parties to fulfil their obligation to provide a plan of action. For example, the structural adjustment programmes that began in the 1970s, the debt crises that followed in the 1980s and the financial crises of the late 1990s, as well as other factors, have greatly exacerbated the extent to which the right to primary education is being denied. These difficulties, however, cannot relieve States parties of their obligation to adopt and submit a plan of action to the Committee, as provided for in article 14 of the Covenant.

4. Plans of action prepared by States parties to the Covenant in accordance with article 14 are especially important as the work of the Committee has shown that the lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance these children, who may live in abject poverty and not lead healthy lives, are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school enrolment levels for girls and major reductions in child marriages.

5. Article 14 contains a number of elements which warrant some elaboration in the light of the Committee's extensive experience in examining State party reports.

6. *Compulsory.* The element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education. Similarly, the prohibition of gender discrimination in access to education, required also by articles 2 and 3 of the Covenant, is further underlined by this requirement. It should be emphasized, however, that the education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights.

7. *Free of charge.* The nature of this requirement is unequivocal. The right is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Fees imposed by the Government, the local authorities or the school, and other direct costs, constitute disincentives to the enjoyment of the right and may jeopardize its realization. They are also often highly regressive in effect. Their elimination is a matter which must be addressed by the required plan of action. Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis. This provision of compulsory primary education in no way conflicts with the right recognized in article 13.3 of the Covenant for parents and guardians "to choose for their children schools other than those established by the public authorities".

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\* See generally UNICEF, *The State of the World's Children, 1999*.



8. *Adoption of a detailed plan.* The State party is required to adopt a plan of action within two years. This must be interpreted as meaning within two years of the Covenant's entry into force of the State concerned, or within two years of a subsequent change in circumstances which has led to the non-observance of the relevant obligation. This obligation is a continuing one and States parties to which the provision is relevant by virtue of the prevailing situation are not absolved from the obligation as a result of their past failure to act within the two-year limit. The plan must cover all of the actions which are necessary in order to secure each of the requisite component parts of the right and must be sufficiently detailed so as to ensure the comprehensive realization of the right. Participation of all sections of civil society in the drawing up of the plan is vital and some means of periodically reviewing progress and ensuring accountability are essential. Without those elements, the significance of the article would be undermined.

9. *Obligations.* A State party cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available. If the obligation could be avoided in this way, there would be no justification for the unique requirement contained in article 14 which applies, almost by definition, to situations characterized by inadequate financial resources. By the same token, and for the same reason, the reference to "international assistance and cooperation" in article 2.1 and to "international action" in article 23 of the Covenant are of particular relevance in this situation. Where a State party is clearly lacking in the financial resources and/or expertise required to "work out and adopt" a detailed plan, the international community has a clear obligation to assist.

10. *Progressive implementation.* The plan of action must be aimed at securing the progressive implementation of the right to compulsory primary education, free of charge, under article 14. Unlike the provision in article 2.1, however, article 14 specifies that the target date must be "within a reasonable number of years" and, moreover, that the time frame must "be fixed in the plan". In other words, the plan must specifically set out a series of targeted implementation dates for each stage of the progressive implementation of the plan. This underscores both the importance and the relative inflexibility of the obligation in question. Moreover, it needs to be stressed in this regard that the State party's other obligations, such as non-discrimination, are required to be implemented fully and immediately.

11. The Committee calls upon every State party to which article 14 is relevant to ensure that its terms are fully complied with and that the resulting plan of action is submitted to the Committee as an integral part of the reports required under the Covenant. Further, in appropriate cases, the Committee encourages States parties to seek the assistance of relevant international agencies, including the International Labour Organization (ILO), the United Nations Development Programme (UNDP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Children's Fund (UNICEF), the International Monetary Fund (IMF) and the World Bank, in relation both to the preparation of plans of action under article 14 and their subsequent implementation. The Committee also calls upon the relevant international agencies to assist States parties to the greatest extent possible to meet their obligations on an urgent basis.

**Twentieth session (1999)\***

**General comment No. 12: The right to adequate food (art. 11)**

**Introduction and basic premises**

1. The human right to adequate food is recognized in several instruments under international law. The International Covenant on Economic, Social and Cultural Rights deals more comprehensively than any other instrument with this right. Pursuant to article 11.1 of the Covenant, States parties recognize “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, while pursuant to article 11.2 they recognize that more immediate and urgent steps may be needed to ensure “the fundamental right to freedom from hunger and malnutrition”. The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone; thus the reference in article 11.1 to “himself and his family” does not imply any limitation upon the applicability of this right to individuals or to female-headed households.

2. The Committee has accumulated significant information pertaining to the right to adequate food through examination of State parties’ reports over the years since 1979. The Committee has noted that while reporting guidelines are available relating to the right to adequate food, only a few States parties have provided information sufficient and precise enough to enable the Committee to determine the prevailing situation in the countries concerned with respect to this right and to identify the obstacles to its realization. This general comment aims to identify some of the principal issues which the Committee considers to be important in relation to the right to adequate food. Its preparation was triggered by the request of Member States during the 1996 World Food Summit for a better definition of the rights relating to food in article 11 of the Covenant, and by a special request to the Committee to give particular attention to the Summit Plan of Action in monitoring the implementation of the specific measures provided for in article 11 of the Covenant.

3. In response to these requests, the Committee reviewed the relevant reports and documentation of the Commission on Human Rights and of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to adequate food as a human right; devoted a day of general discussion to this issue at its seventh session in 1997, taking into consideration the draft international code of conduct on the human right to adequate food prepared by international non-governmental organizations; participated in two expert consultations on the right to adequate food as a human right organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR), in Geneva in December 1997, and in Rome in November 1998 co-hosted by the Food and Agriculture Organization of the United Nations (FAO), and noted their final reports. In April 1999 the Committee participated in a symposium on “The substance and politics of a human rights approach to food and

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\* Contained in document E/C.12/1999/5.

nutrition policies and programmes”, organized by the Administrative Committee on Coordination/Sub-Committee on Nutrition of the United Nations at its twenty-sixth session in Geneva and hosted by OHCHR.

4. The Committee affirms that the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.

5. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate food, a disturbing gap still exists between the standards set in article 11 of the Covenant and the situation prevailing in many parts of the world. More than 840 million people throughout the world, most of them in developing countries, are chronically hungry; millions of people are suffering from famine as the result of natural disasters, the increasing incidence of civil strife and wars in some regions and the use of food as a political weapon. The Committee observes that while the problems of hunger and malnutrition are often particularly acute in developing countries, malnutrition, under-nutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries. Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world’s population.

#### **Normative content of article 11, paragraphs 1 and 2**

6. The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The *right to adequate food* will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11, even in times of natural or other disasters.

#### **Adequacy and sustainability of food availability and access**

7. The concept of *adequacy* is particularly significant in relation to the right to food since it serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances for the purposes of article 11 of the Covenant. The notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*, implying food being accessible for both present and future generations. The precise meaning of “adequacy” is to a large extent determined by prevailing social, economic, cultural, climatic, ecological and other conditions, while “sustainability” incorporates the notion of long-term availability and accessibility.

8. The Committee considers that the core content of the right to adequate food implies:

The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

9. *Dietary needs* implies that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity that are in compliance with human physiological needs at all stages throughout the life cycle and according to gender and occupation. Measures may therefore need to be taken to maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns, including breastfeeding, while ensuring that changes in availability and access to food supply as a minimum do not negatively affect dietary composition and intake.

10. *Free from adverse substances* sets requirements for food safety and for a range of protective measures by both public and private means to prevent contamination of foodstuffs through adulteration and/or through bad environmental hygiene or inappropriate handling at different stages throughout the food chain; care must also be taken to identify and avoid or destroy naturally occurring toxins.

11. *Cultural or consumer acceptability* implies the need also to take into account, as far as possible, perceived non-nutrient-based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.

12. *Availability* refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand.

13. *Accessibility* encompasses both economic and physical accessibility:

Economic accessibility implies that personal or household financial costs associated with the acquisition of food for an adequate diet should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. Economic accessibility applies to any acquisition pattern or entitlement through which people procure their food and is a measure of the extent to which it is satisfactory for the enjoyment of the right to adequate food. Socially vulnerable groups such as landless persons and other particularly impoverished segments of the population may need attention through special programmes.

Physical accessibility implies that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems,

including the mentally ill. Victims of natural disasters, people living in disaster-prone areas and other specially disadvantaged groups may need special attention and sometimes priority consideration with respect to accessibility of food. A particular vulnerability is that of many indigenous population groups whose access to their ancestral lands may be threatened.

## Obligations and violations

14. The nature of the legal obligations of States parties is set out in article 2 of the Covenant and has been dealt with in the Committee's general comment No. 3 (1990). The principal obligation is to take steps to achieve *progressively* the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal. Every State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.<sup>\*</sup> The obligation to *respect* existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to *fulfil (facilitate)* means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.

16. Some measures at these different levels of obligations of States parties are of a more immediate nature, while other measures are more of a long-term character, to achieve progressively the full realization of the right to food.

17. Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.

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\* Originally three levels of obligations were proposed: to respect, protect and assist/fulfil. (See *Right to adequate food as a human right*, Study Series No. 1, New York, 1989 (United Nations publication, Sales No. E.89.XIV.2)). The intermediate level of "to facilitate" has been proposed as a Committee category, but the Committee decided to maintain the three levels of obligation.

This follows from article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its general comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.

18. Furthermore, any discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States. These include: the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations.

20. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities in the realization of the right to adequate food. The State should provide an environment that facilitates implementation of these responsibilities. The private business sector - national and transnational - should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food, agreed upon jointly with the Government and civil society.

### **Implementation at the national level**

21. The most appropriate ways and means of implementing the right to adequate food will inevitably vary significantly from one State party to another. Every State will have a margin of discretion in choosing its own approaches, but the Covenant clearly requires that each State party take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food. This will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks. It should also identify the resources available to meet the objectives and the most cost-effective way of using them.

22. The strategy should be based on a systematic identification of policy measures and activities relevant to the situation and context, as derived from the normative content of the right to adequate food and spelled out in relation to the levels and nature of State parties' obligations

referred to in paragraph 15 of the present general comment. This will facilitate coordination between ministries and regional and local authorities and ensure that related policies and administrative decisions are in compliance with the obligations under article 11 of the Covenant.

23. The formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary. Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.

24. Appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition. The strategy should set out the responsibilities and time frame for the implementation of the necessary measures.

25. The strategy should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security. Care should be taken to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels.

26. The strategy should give particular attention to the need to prevent discrimination in access to food or resources for food. This should include: guarantees of full and equal access to economic resources, particularly for women, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families (as stipulated in article 7 (a) (ii) of the Covenant); maintaining registries on rights in land (including forests).

27. As part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.

28. Even where a State faces severe resource constraints, whether caused by a process of economic adjustment, economic recession, climatic conditions or other factors, measures should be undertaken to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals.

### **Benchmarks and framework legislation**

29. In implementing the country-specific strategies referred to above, States should set verifiable benchmarks for subsequent national and international monitoring. In this connection, States should consider the adoption of a *framework law* as a major instrument in the implementation of the national strategy concerning the right to food. The framework law should include provisions on its purpose; the targets or goals to be achieved and the time frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process;

and the national mechanisms for its monitoring, as well as possible recourse procedures. In developing the benchmarks and framework legislation, States parties should actively involve civil society organizations.

30. Appropriate United Nations programmes and agencies should assist, upon request, in drafting the framework legislation and in reviewing the sectoral legislation. FAO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of food and agriculture. The United Nations Children's Fund (UNICEF) has equivalent expertise concerning legislation with regard to the right to adequate food for infants and young children through maternal and child protection including legislation to enable breastfeeding, and with regard to the regulation of marketing of breast milk substitutes.

### **Monitoring**

31. States parties shall develop and maintain mechanisms to monitor progress towards the realization of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementation of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

### **Remedies and accountability**

32. Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National Ombudsmen and human rights commissions should address violations of the right to food.

33. The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.

34. Judges and other members of the legal profession are invited to pay greater attention to violations of the right to food in the exercise of their functions.

35. States parties should respect and protect the work of human rights advocates and other members of civil society who assist vulnerable groups in the realization of their right to adequate food.

### **International obligations**

#### **States parties**

36. In the spirit of Article 56 of the Charter of the United Nations, the specific provisions contained in articles 11, 2.1, and 23 of the Covenant and the Rome Declaration of the World Food Summit, States parties should recognize the essential role of international cooperation and



comply with their commitment to take joint and separate action to achieve the full realization of the right to adequate food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

37. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its general comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

### **States and international organizations**

38. States have a joint and individual responsibility, in accordance with the Charter of the United Nations, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task in accordance with its ability. The role of the World Food Programme (WFP) and the Office of the United Nations High Commissioner for Refugees (UNHCR), and increasingly that of UNICEF and FAO is of particular importance in this respect and should be strengthened. Priority in food aid should be given to the most vulnerable populations.

39. Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programmes must be safe and culturally acceptable to the recipient population.

### **The United Nations and other international organizations**

40. The role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance. Coordinated efforts for the realization of the right to food should be maintained to enhance coherence and interaction among all the actors concerned, including the various components of civil society. The food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD), in conjunction with the United Nations Development Programme (UNDP), UNICEF, the World Bank and the regional development banks, should cooperate more effectively, building on their respective expertise, on the implementation of the right to food at the national level, with due respect to their individual mandates.

41. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's general comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected.

**Twenty-first session (1999)**

**General comment No. 13: The right to education (art. 13)**

1. Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

2. The International Covenant on Economic, Social and Cultural Rights (ICESCR) devotes two articles to the right to education, articles 13 and 14. Article 13, the longest provision in the Covenant, is the most wide-ranging and comprehensive article on the right to education in international human rights law. The Committee has already adopted general comment No. 11 on article 14 (plans of action for primary education); general comment No. 11 and the present general comment are complementary and should be considered together. The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties.

3. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 13 (Part I, paras. 4-42), some of the obligations arising from it (Part II, paras. 43-57), and some illustrative violations (Part II, paras. 58-59). Part III briefly remarks upon the obligations of actors other than States parties. The general comment is based upon the Committee's experience in examining States parties' reports over many years.

**1. Normative content of article 13**

**Article 13 (1): Aims and objectives of education**

4. States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and

religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that “education shall be directed to the full development of the human personality”.

5. The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13 (1) of the Covenant, they also include elements which are not expressly provided for in article 13 (1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13 (1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world.<sup>1</sup>

#### **Article 13 (2): The right to receive an education - some general remarks**

6. While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:<sup>2</sup>

(a) *Availability.* Functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;

(b) *Accessibility.* Educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:

Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);

Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);

Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education;

(c) *Acceptability* - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) *Adaptability* - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

7. When considering the appropriate application of these “interrelated and essential features” the best interests of the student shall be a primary consideration.

#### **Article 13 (2) (a): The right to primary education**

8. Primary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.<sup>3</sup>

9. The Committee obtains guidance on the proper interpretation of the term “primary education” from the World Declaration on Education for All which states: “The main delivery system for the basic education of children outside the family is primary schooling. Primary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community” (art. 5). “[B]asic learning needs” are defined in article 1 of the World Declaration.<sup>4</sup> While primary education is not synonymous with basic education, there is a close correspondence between the two. In this regard, the Committee endorses the position taken by UNICEF: “Primary education is the most important component of basic education.”<sup>5</sup>

10. As formulated in article 13 (2) (a), primary education has two distinctive features: it is “compulsory” and “available free to all”. For the Committee’s observations on both terms, see paragraphs 6 and 7 of general comment No. 11 on article 14 of the Covenant.

#### **Article 13 (2) (b): The right to secondary education**

11. Secondary education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.<sup>6</sup>

12. While the content of secondary education will vary among States parties and over time, it includes completion of basic education and consolidation of the foundations for life-long learning and human development. It prepares students for vocational and higher educational opportunities.<sup>7</sup> Article 13 (2) (b) applies to secondary education “in its different forms”, thereby

recognizing that secondary education demands flexible curricula and varied delivery systems to respond to the needs of students in different social and cultural settings. The Committee encourages “alternative” educational programmes which parallel regular secondary school systems.

13. According to article 13 (2) (b), secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”. The phrase “generally available” signifies, firstly, that secondary education is not dependent on a student’s apparent capacity or ability and, secondly, that secondary education will be distributed throughout the State in such a way that it is available on the same basis to all. For the Committee’s interpretation of “accessible”, see paragraph 6 above. The phrase “every appropriate means” reinforces the point that States parties should adopt varied and innovative approaches to the delivery of secondary education in different social and cultural contexts.

14. “[P]rogressive introduction of free education” means that while States must prioritize the provision of free primary education, they also have an obligation to take concrete steps towards achieving free secondary and higher education. For the Committee’s general observations on the meaning of the word “free”, see paragraph 7 of general comment No. 11 on article 14.

### **Technical and vocational education**

15. Technical and vocational education (TVE) forms part of both the right to education and the right to work (art. 6 (2)). Article 13 (2) (b) presents TVE as part of secondary education, reflecting the particular importance of TVE at this level of education. Article 6 (2), however, does not refer to TVE in relation to a specific level of education; it comprehends that TVE has a wider role, helping “to achieve steady economic, social and cultural development and full and productive employment”. Also, the Universal Declaration of Human Rights states that “[t]echnical and professional education shall be made generally available” (art. 26 (1)). Accordingly, the Committee takes the view that TVE forms an integral element of all levels of education.<sup>8</sup>

16. An introduction to technology and to the world of work should not be confined to specific TVE programmes but should be understood as a component of general education. According to the UNESCO Convention on Technical and Vocational Education (1989), TVE consists of “all forms and levels of the educational process involving, in addition to general knowledge, the study of technologies and related sciences and the acquisition of practical skills, know-how, attitudes and understanding relating to occupations in the various sectors of economic and social life” (art. 1 (a)). This view is also reflected in certain ILO Conventions.<sup>9</sup> Understood in this way, the right to TVE includes the following aspects:

(a) It enables students to acquire knowledge and skills which contribute to their personal development, self-reliance and employability and enhances the productivity of their families and communities, including the State party’s economic and social development;

(b) It takes account of the educational, cultural and social background of the population concerned; the skills, knowledge and levels of qualification needed in the various sectors of the economy; and occupational health, safety and welfare;

(c) Provides retraining for adults whose current knowledge and skills have become obsolete owing to technological, economic, employment, social or other changes;

(d) It consists of programmes which give students, especially those from developing countries, the opportunity to receive TVE in other States, with a view to the appropriate transfer and adaptation of technology;

(e) It consists, in the context of the Covenant's non-discrimination and equality provisions, of programmes which promote the TVE of women, girls, out-of-school youth, unemployed youth, the children of migrant workers, refugees, persons with disabilities and other disadvantaged groups.

### **Article 13 (2) (c): The right to higher education**

17. Higher education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms at all levels.<sup>10</sup>

18. While article 13 (2) (c) is formulated on the same lines as article 13 (2) (b), there are three differences between the two provisions. Article 13 (2) (c) does not include a reference to either education "in its different forms" or specifically to TVE. In the Committee's opinion, these two omissions reflect only a difference of emphasis between article 13 (2) (b) and (c). If higher education is to respond to the needs of students in different social and cultural settings, it must have flexible curricula and varied delivery systems, such as distance learning; in practice, therefore, both secondary and higher education have to be available "in different forms". As for the lack of reference in article 13 (2) (c) to technical and vocational education, given article 6 (2) of the Covenant and article 26 (1) of the Universal Declaration, TVE forms an integral component of all levels of education, including higher education.<sup>11</sup>

19. The third and most significant difference between article 13 (2) (b) and (c) is that while secondary education "shall be made generally available and accessible to all", higher education "shall be made equally accessible to all, on the basis of capacity". According to article 13 (2) (c), higher education is not to be "generally available", but only available "on the basis of capacity". The "capacity" of individuals should be assessed by reference to all their relevant expertise and experience.

20. So far as the wording of article 13 (2) (b) and (c) is the same (e.g. "the progressive introduction of free education"), see the previous comments on article 13 (2) (b).

### **Article 13 (2) (d): The right to fundamental education**

21. Fundamental education includes the elements of availability, accessibility, acceptability and adaptability which are common to education in all its forms and at all levels.<sup>12</sup>

22. In general terms, fundamental education corresponds to basic education as set out in the World Declaration on Education For All.<sup>13</sup> By virtue of article 13 (2) (d), individuals "who have not received or completed the whole period of their primary education" have a right to fundamental education, or basic education as defined in the World Declaration on Education For All.

23. Since everyone has the right to the satisfaction of their “basic learning needs” as understood by the World Declaration, the right to fundamental education is not confined to those “who have not received or completed the whole period of their primary education”. The right to fundamental education extends to all those who have not yet satisfied their “basic learning needs”.

24. It should be emphasized that enjoyment of the right to fundamental education is not limited by age or gender; it extends to children, youth and adults, including older persons. Fundamental education, therefore, is an integral component of adult education and life-long learning. Because fundamental education is a right of all age groups, curricula and delivery systems must be devised which are suitable for students of all ages.

**Article 13 (2) (e): A school system; adequate fellowship system;  
material conditions of teaching staff**

25. The requirement that the “development of a system of schools at all levels shall be actively pursued” means that a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritize primary education (see para. 51). “[A]ctively pursued” suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigour.

26. The requirement that “an adequate fellowship system shall be established” should be read with the Covenant’s non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.

27. While the Covenant requires that “the material conditions of teaching staff shall be continuously improved”, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13 (2) (e), but it is also a major obstacle to the full realization of students’ right to education. The Committee also notes the relationship between articles 13 (2) (e), 2 (2), 3 and 6-8 of the Covenant, including the right of teachers to organize and bargain collectively; draws the attention of States parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role.

**Article 13 (3) and (4): The right to educational freedom**

28. Article 13 (3) has two elements, one of which is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>14</sup> The Committee is of the view that this element of article 13 (3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a

particular religion or belief is inconsistent with article 13 (3) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

29. The second element of article 13 (3) is the liberty of parents and guardians to choose other than public schools for their children, provided the schools conform to “such minimum educational standards as may be laid down or approved by the State”. This has to be read with the complementary provision, article 13 (4), which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in article 13 (1) and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In their turn, these standards must be consistent with the educational objectives set out in article 13 (1).

30. Under article 13 (4), everyone, including non-nationals, has the liberty to establish and direct educational institutions. The liberty also extends to “bodies”, i.e. legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of non-discrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 (4) does not lead to extreme disparities of educational opportunity for some groups in society.

### **Article 13: Special topics of broad application**

#### **Non-discrimination and equal treatment**

31. The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2 (2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues.

32. The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the objectives for which they were taken have been achieved.

33. In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2 (2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960).<sup>15</sup>



34. The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.

35. Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.

36. The Committee affirms paragraph 35 of its general comment No. 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36-42 of its general comment No. 6, which address the issue of older persons in relation to articles 13-15 of the Covenant.

37. States parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.

#### **Academic freedom and institutional autonomy<sup>16</sup>**

38. In the light of its examination of numerous States parties' reports, the Committee has formed the view that the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee's experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom and many of the following observations have general application.

39. Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds.

40. The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public

accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible.

### **Discipline in schools<sup>17</sup>**

41. In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual.<sup>18</sup> Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce "positive", non-violent approaches to school discipline.

### **Limitations on article 13**

42. The Committee wishes to emphasize that the Covenant's limitations clause, article 4, is primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State. Consequently, a State party which closes a university or other educational institution on grounds such as national security or the preservation of public order has the burden of justifying such a serious measure in relation to each of the elements identified in article 4.

## **2. States parties' obligations and violations**

### **General legal obligations**

43. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.<sup>19</sup> States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art. 2 (2)) and the obligation "to take steps" (art. 2 (1)) towards the full realization of article 13.<sup>20</sup> Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education.

44. The realization of the right to education over time, that is "progressively", should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13.<sup>21</sup>

45. There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any

deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.<sup>22</sup>

46. The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

47. The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.

48. In this respect, two features of article 13 require emphasis. First, it is clear that article 13 regards States as having principal responsibility for the direct provision of education in most circumstances; States parties recognize, for example, that the "development of a system of schools at all levels shall be actively pursued" (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party's obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.

### **Specific legal obligations**

49. States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13 (1).<sup>23</sup> They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13 (1).

50. In relation to article 13 (2), States have obligations to respect, protect and fulfil each of the "essential features" (availability, accessibility, acceptability, adaptability) of the right to education. By way of illustration, a State must respect the availability of education by not closing private schools; protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary

needs of students in a changing world; and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.

51. As already observed, the obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. Given the wording of article 13 (2), States parties are obliged to prioritize the introduction of compulsory, free primary education.<sup>24</sup> This interpretation of article 13 (2) is reinforced by the priority accorded to primary education in article 14. The obligation to provide primary education for all is an immediate duty of all States parties.

52. In relation to article 13 (2) (b)-(d), a State party has an immediate obligation “to take steps” (art. 2 (1)) towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored.

53. Under article 13 (2) (e), States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups.<sup>25</sup> The obligation to pursue actively the “development of a system of schools at all levels” reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances.<sup>26</sup>

54. States parties are obliged to establish “minimum educational standards” to which all educational institutions established in accordance with article 13 (3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance with article 13 (3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds.

55. States parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7 (2) of the Worst Forms of Child Labour Convention, 1999 (Convention No. 182).<sup>27</sup> Additionally, given article 2 (2), States parties are obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups.

56. In its general comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, “individually and through international assistance and cooperation, especially economic and technical”, towards the full realization of the rights recognized in the Covenant, such as the right to education.<sup>28</sup> Articles 2 (1) and 23 of the Covenant, Article 56 of the Charter of the United Nations, article 10 of the World Declaration on Education for All, and Part I, paragraph 34 of the Vienna Declaration and Programme of Action all reinforce the obligation of States parties in relation to the provision of international assistance and cooperation for the full realization of the right to education. In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not

adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education.

57. In its general comment No. 3, the Committee confirmed that States parties have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels” of each of the rights enunciated in the Covenant, including “the most basic forms of education”. In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with “minimum educational standards” (art. 13 (3) and (4)).

### **Violations**

58. When the normative content of article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).

59. By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with article 13 (1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take “deliberate, concrete and targeted” measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13 (2) (b)-(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the “minimum educational standards” required by article 13 (3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in non-conformity with article 4.

### **3. Obligations of actors other than States parties**

60. Given article 22 of the Covenant, the role of the United Nations agencies, including at the country level through the United Nations Development Assistance Framework (UNDAF), is of special importance in relation to the realization of article 13. Coordinated efforts for the realization of the right to education should be maintained to improve coherence and interaction among all the actors concerned, including the various components of civil society. UNESCO, the United Nations Development Programme, UNICEF, ILO, the World Bank, the regional development banks, the International Monetary Fund and other relevant bodies within the United Nations system should enhance their cooperation for the implementation of the right to education at the national level, with due respect to their specific mandates, and building on their

respective expertise. In particular, the international financial institutions, notably the World Bank and IMF, should pay greater attention to the protection of the right to education in their lending policies, credit agreements, structural adjustment programmes and measures taken in response to the debt crisis.<sup>29</sup> When examining the reports of States parties, the Committee will consider the effects of the assistance provided by all actors other than States parties on the ability of States to meet their obligations under article 13. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to education.

### Notes

<sup>1</sup> The World Declaration on Education for All was adopted by 155 governmental delegations; the Vienna Declaration and Programme of Action was adopted by 171 governmental delegations; the Convention on the Rights of the Child has been ratified or acceded to by 191 States parties; the Plan of Action of the United Nations Decade for Human Rights Education was adopted by a consensus resolution of the General Assembly (49/184).

<sup>2</sup> This approach corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education. In its general comment No. 4, the Committee identified a number of factors which bear upon the right to adequate housing, including "availability", "affordability", "accessibility" and "cultural adequacy". In its general comment No. 12, the Committee identified elements of the right to adequate food, such as "availability", "acceptability" and "accessibility". In her preliminary report to the Commission on Human Rights, the Special Rapporteur on the right to education sets out "four essential features that primary schools should exhibit, namely availability, accessibility, acceptability and adaptability", (E/CN.4/1999/49, para. 50).

<sup>3</sup> See paragraph 6.

<sup>4</sup> The Declaration defines "basic learning needs" as: "essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning" (article 1).

<sup>5</sup> Advocacy Kit, Basic Education 1999 (UNICEF), sect. 1, p. 1.

<sup>6</sup> See paragraph 6.

<sup>7</sup> See International Standard Classification of Education 1997, UNESCO, paragraph 52.

<sup>8</sup> A view also reflected in the Human Resources Development Convention 1975 (Convention No. 142) and the Social Policy (Basic Aims and Standards) Convention 1962 (Convention No. 117) of the International Labour Organization.

<sup>9</sup> See note 8.

<sup>10</sup> See paragraph 6.

<sup>11</sup> See paragraph 15.

<sup>12</sup> See paragraph 6.

<sup>13</sup> See paragraph 9.

<sup>14</sup> This replicates article 18 (4) of the International Covenant on Civil and Political Rights (ICCPR) and also relates to the freedom to teach a religion or belief as stated in article 18 (1) ICCPR. (See Human Rights Committee general comment No. 22 on article 18 ICCPR, forty-eighth session, 1993.) The Human Rights Committee notes that the fundamental character of article 18 ICCPR is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of that Covenant.

<sup>15</sup> According to article 2:

“When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.”

<sup>16</sup> See UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).

<sup>17</sup> In formulating this paragraph, the Committee has taken note of the practice evolving elsewhere in the international human rights system, such as the interpretation given by the Committee on the Rights of the Child to article 28 (2) of the Convention on the Rights of the Child, as well as the Human Rights Committee's interpretation of article 7 of ICCPR.

<sup>18</sup> The Committee notes that, although it is absent from article 26 (2) of the Declaration, the drafters of ICESCR expressly included the dignity of the human personality as one of the mandatory objectives to which all education is to be directed (art. 13 (1)).

<sup>19</sup> See the Committee's general comment No. 3, paragraph 1.

<sup>20</sup> See the Committee's general comment No. 3, paragraph 2.

<sup>21</sup> See the Committee's general comment No. 3, paragraph 9.

<sup>22</sup> See the Committee's general comment No. 3, paragraph 9.

<sup>23</sup> There are numerous resources to assist States parties in this regard, such as UNESCO's Guidelines for Curriculum and Textbook Development in International Education (ED/ECS/HCI). One of the objectives of article 13 (1) is to "strengthen the respect of human rights and fundamental freedoms"; in this particular context, States parties should examine the initiatives developed within the framework of the United Nations Decade for Human Rights Education - especially instructive is the Plan of Action for the Decade, adopted by the General Assembly in 1996, and the Guidelines for National Plans of Action for Human Rights Education, developed by the Office of the High Commissioner for Human Rights to assist States in responding to the United Nations Decade for Human Rights Education.

<sup>24</sup> On the meaning of "compulsory" and "free", see paragraphs 6 and 7 of general comment No. 11 on article 14.

<sup>25</sup> In appropriate cases, such a fellowship system would be an especially appropriate target for the international assistance and cooperation anticipated by article 2 (1).

<sup>26</sup> In the context of basic education, UNICEF has observed: "Only the State ... can pull together all the components into a coherent but flexible education system". UNICEF, *The State of the World's Children, 1999*, "The education revolution", page 77.

<sup>27</sup> According to article 7 (2), "(e)ach Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to: (c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour" (ILO Convention 182, Worst Forms of Child Labour, 1999).

<sup>28</sup> See the Committee's general comment No. 3, paragraphs 13-14.

<sup>29</sup> See the Committee's general comment No. 2, paragraph 9.



**Twenty-second session (2000)**

**General comment No. 14: The right to the highest attainable  
standard of health (art. 12)**

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.<sup>1</sup>

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services”. The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, while article 12.2 enumerates, by way of illustration, a number of “steps to be taken by the States parties ... to achieve the full realization of this right”. Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples’ Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights,<sup>2</sup> as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.<sup>3</sup>

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

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. However, the reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of

socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.

6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The general comment is based on the Committee's experience in examining States parties' reports over many years.

### **1. Normative content of article 12**

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States parties' obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.<sup>4</sup> Moreover, formerly unknown

diseases, such as human immunodeficiency virus and acquired immunodeficiency syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) *Availability.* Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs;<sup>5</sup>

(b) *Accessibility.* Health facilities, goods and services<sup>6</sup> have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds;<sup>7</sup>

Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities;

Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring

that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;

Information accessibility: accessibility includes the right to seek, receive and impart information and ideas<sup>8</sup> concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality;

(c) *Acceptability*. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned;

(d) *Quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs.<sup>9</sup>

#### **Article 12.2 (a): The right to maternal, child and reproductive health**

14. “The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child” (art. 12.2 (a))<sup>10</sup> may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care,<sup>11</sup> emergency obstetric services and access to information, as well as to resources necessary to act on that information.<sup>12</sup>

#### **Article 12.2 (b): The right to healthy natural and workplace environments**

15. “The improvement of all aspects of environmental and industrial hygiene” (art. 12.2 (b)) comprises, inter alia, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.<sup>13</sup> Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.<sup>14</sup> Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

### **Article 12.2 (c): The right to prevention, treatment and control of diseases**

16. “The prevention, treatment and control of epidemic, endemic, occupational and other diseases” (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States’ individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

### **Article 12.2 (d): The right to health facilities, goods and services<sup>15</sup>**

17. “The creation of conditions which would assure to all medical service and medical attention in the event of sickness” (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

## **Article 12: Special topics of broad application**

### **Non-discrimination and equal treatment**

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls general comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any

discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.<sup>16</sup> Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

### **Gender perspective**

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and sociocultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

### **Women and the right to health**

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

### **Children and adolescents**

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.<sup>17</sup> The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children.<sup>18</sup> Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

### **Older persons**

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of general comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

### **Persons with disabilities**

26. The Committee reaffirms paragraph 34 of its general comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

### **Indigenous peoples**

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples,<sup>19</sup> the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

## Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to allow doctors to treat persons believed to be opposed to a Government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

## 2. States parties' obligations

### General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.<sup>20</sup>

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.<sup>21</sup>

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.<sup>22</sup>

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.<sup>23</sup> The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The



obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

### Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.

Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.<sup>24</sup> In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, inter alia, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to *fulfil* requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation

and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.<sup>25</sup>

37. The obligation to *fulfil (facilitate)* requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil (provide)* a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health-care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

### **International obligations**

38. In its general comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of Article 56 of the Charter of the United Nations, the specific provisions of the Covenant (arts. 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.<sup>26</sup>

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of

legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.<sup>27</sup> States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in general comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. States parties should therefore provide an environment which facilitates the discharge of these responsibilities.

### **Core obligations**

43. In general comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development,<sup>28</sup> the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

44. The Committee also confirms that the following are obligations of comparable priority:

- (a) To ensure reproductive, maternal (prenatal as well as post-natal) and child health care;
- (b) To provide immunization against the major infectious diseases occurring in the community;
- (c) To take measures to prevent, treat and control epidemic and endemic diseases;
- (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- (e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide “international assistance and cooperation, especially economic and technical”<sup>29</sup> which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

### **3. Violations**

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of commission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.

49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.

### **Violations of the obligation to respect**

50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

### **Violations of the obligation to protect**

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to

health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

### **Violations of the obligation to fulfil**

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

## **4. Implementation at the national level**

### **Framework legislation**

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is

essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

### **Right to health indicators and benchmarks**

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

### **Remedies and accountability**

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.<sup>30</sup> All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.<sup>31</sup> Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

### **5. Obligations of actors other than States parties**

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, the International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non-governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

Adopted on 11 May 2000.



## Notes

<sup>1</sup> For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

<sup>2</sup> In its resolution 1989/11.

<sup>3</sup> The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's general comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

<sup>4</sup> Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, article 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, article 4 (a).

<sup>5</sup> See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

<sup>6</sup> Unless expressly provided otherwise, any reference in this general comment to health facilities, goods and services includes the underlying determinants of health outlined in paragraphs 11 and 12 (a) of this general comment.

<sup>7</sup> See paragraphs 18 and 19 of this general comment.

<sup>8</sup> See article 19.2 of the International Covenant on Civil and Political Rights. This general comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.

<sup>9</sup> In the literature and practice concerning the right to health, three levels of health care are frequently referred to: *primary health care* typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes inpatient care at comparatively higher cost; *tertiary health care* is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

<sup>10</sup> According to WHO, the stillbirth rate is no longer commonly used, infant and under-5 mortality rates being measured instead.

<sup>11</sup> *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this general comment, the more generic terms pre- and post-natal are exclusively employed.

<sup>12</sup> Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

<sup>13</sup> The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”, as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

<sup>14</sup> ILO Convention No. 155, article 4.2.

<sup>15</sup> See paragraph 12 (b) and note 8 above.

<sup>16</sup> For the core obligations, see paragraphs 43 and 44 of the present general comments.

<sup>17</sup> Article 24.1 of the Convention on the Rights of the Child.

<sup>18</sup> See World Health Assembly resolution WHA47.10, 1994, entitled “Maternal and child health and family planning: traditional practices harmful to the health of women and children”.

<sup>19</sup> Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries

Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

<sup>20</sup> See general comment No. 13, paragraph 43.

<sup>21</sup> See general comment No. 3, paragraph 9; general comment No. 13, paragraph 44.

<sup>22</sup> See general comment No. 3, paragraph 9; general comment No. 13, paragraph 45.

<sup>23</sup> According to general comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present general comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

<sup>24</sup> General Assembly resolution 46/119 (1991).

<sup>25</sup> Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

<sup>26</sup> Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.

<sup>27</sup> See paragraph 45 of this general comment.

<sup>28</sup> *Report of the International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.

<sup>29</sup> Covenant, art. 2.1.

<sup>30</sup> Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

<sup>31</sup> See general comment No. 2, paragraph 9.

**Twenty-ninth session (2002)**

**General comment No. 15: The right to water  
(arts. 11 and 12 of the Covenant)**

**I. INTRODUCTION**

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over 1 billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.<sup>1</sup> The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realize, without discrimination, the right to water, as set out in this general comment.

**The legal bases of the right to water**

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

3. Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realization of the right to an adequate standard of living “including adequate food, clothing and housing”. The use of the word “including” indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognized that water is a human right contained in article 11, paragraph 1, (see general comment No. 6 (1995)).<sup>2</sup> The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)<sup>3</sup> and the rights to adequate housing and adequate food (art. 11, para. 1).<sup>4</sup> The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

4. The right to water has been recognized in a wide range of international documents, including treaties, declarations and other standards.<sup>5</sup> For instance, Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that States parties shall ensure to women the right to “enjoy adequate living conditions, particularly in relation to [...] water supply”. Article 24, paragraph 2, of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition “through the provision of adequate nutritious foods and clean drinking water”.

5. The right to water has been consistently addressed by the Committee during its consideration of States parties’ reports, in accordance with its revised general guidelines

regarding the form and content of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, and its general comments.

6. Water is required for a range of different purposes, besides personal and domestic uses, to realize many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights.<sup>6</sup>

### **Water and Covenant rights**

7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food (see general comment No. 12 (1999)).<sup>7</sup> Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.<sup>8</sup>

8. Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (b), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions.<sup>9</sup> For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States parties should monitor and combat situations where aquatic ecosystems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.<sup>10</sup>

9. With a view to assisting States parties’ implementation of the Covenant and the fulfilment of their reporting obligations, this general comment focuses in Part II on the normative content of the right to water in articles 11, paragraph 1, and 12, on States parties’ obligations (Part III), on violations (Part IV) and on implementation at the national level (Part V), while the obligations of actors other than States parties are addressed in Part VI.

## **II. NORMATIVE CONTENT OF THE RIGHT TO WATER**

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

11. The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.<sup>11</sup>

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

(a) *Availability*. The water supply for each person must be sufficient and continuous for personal and domestic uses.<sup>12</sup> These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene.<sup>13</sup> The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.<sup>14</sup> Some individuals and groups may also require additional water due to health, climate, and work conditions;

(b) *Quality*. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health.<sup>15</sup> Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use;

(c) *Accessibility*. Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

- (i) *Physical accessibility*: Water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.<sup>16</sup> All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;
- (ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;
- (iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and
- (iv) *Information accessibility*: Accessibility includes the right to seek, receive and impart information concerning water issues.<sup>17</sup>

## **Special topics of broad application**

### **Non-discrimination and equality**

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of general comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.

15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum-seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

(a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;

(b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency;

(c) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;

(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

(e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

(f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals;

(g) Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners;<sup>18</sup>

(h) Groups facing difficulties with physical access to water, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water.

### **III. STATES PARTIES' OBLIGATIONS**

#### **General legal obligations**

17. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para. 1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water.

18. States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water. Realization of the right should be feasible and practicable, since all States parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.



19. There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant.<sup>19</sup> If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.

### **Specific legal obligations**

20. The right to water, like any human right, imposes three types of obligations on States parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*.

#### *(a) Obligations to respect*

21. The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to, or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

22. The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law.<sup>20</sup> This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.<sup>21</sup>

#### *(b) Obligations to protect*

23. The obligation to *protect* requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this general comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

(c) *Obligations to fulfil*

25. The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

27. To ensure that water is affordable, States parties must adopt the necessary measures that may include, inter alia: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

28. States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.<sup>22</sup> Such strategies and programmes may include: (a) reducing depletion of water resources through unsustainable extraction, diversion and damming; (b) reducing and eliminating contamination of watersheds and water-related ecosystems by substances such as radiation, harmful chemicals and human excreta; (c) monitoring water reserves; (d) ensuring that proposed developments do not interfere with access to adequate water; (e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity;<sup>23</sup> (f) increasing the efficient use of water by end-users; (g) reducing water wastage in its distribution; (h) response mechanisms for emergency situations; (i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

29. Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources.<sup>24</sup> In accordance with the rights to health and adequate housing (see general comments Nos. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

## **International obligations**

30. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.<sup>25</sup>

32. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water.<sup>26</sup> Water should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its general comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights.

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

35. States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

36. States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.

### **Core obligations**

37. In general comment No. 3 (1990), the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;
- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;
- (d) To ensure personal security is not threatened when having to physically access to water;
- (e) To ensure equitable distribution of all available water facilities and services;
- (f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;
- (g) To monitor the extent of the realization, or the non-realization, of the right to water;
- (h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;
- (i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation.

38. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations indicated in paragraph 37 above.

### **IV. VIOLATIONS**

39. When the normative content of the right to water (see Part II) is applied to the obligations of States parties (Part III), a process is set in motion, which facilitates identification of violations of the right to water. The following paragraphs provide illustrations of violations of the right to water.

40. To demonstrate compliance with their general and specific obligations, States parties must establish that they have taken the necessary and feasible steps towards the realization of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable.

41. In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations in relation to the right to water. This follows from articles 11, paragraph 1, and 12, which speak of the right to an adequate standard of living and the right to health, as well as from article 2, paragraph 1, of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

42. Violations of the right to water can occur through *acts of commission*, the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of retrogressive measures incompatible with the core obligations (outlined in paragraph 37 above), the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water.

43. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to water, the failure to have a national policy on water, and the failure to enforce relevant laws.

44. While it is not possible to specify a complete list of violations in advance, a number of typical examples relating to the levels of obligations, emanating from the Committee's work, may be identified:

(a) Violations of the obligation to respect follow from the State party's interference with the right to water. This includes, inter alia: (i) arbitrary or unjustified disconnection or exclusion from water services or facilities; (ii) discriminatory or unaffordable increases in the price of water; and (iii) pollution and diminution of water resources affecting human health;

(b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.<sup>27</sup> This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iii) failure to protect water distribution systems (e.g. piped networks and wells) from interference, damage and destruction; and

(c) Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to water. Examples include, inter alia: (i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone; (ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized; (iii) failure to monitor the realization of the right to water at the national level, for example by identifying right-to-water indicators and benchmarks; (iv) failure to take measures to reduce the inequitable distribution of water facilities and services; (v) failure to adopt mechanisms for emergency relief; (vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone; (vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

## **V. IMPLEMENTATION AT THE NATIONAL LEVEL**

45. In accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize “all appropriate means, including particularly the adoption of legislative measures” in the implementation of their Covenant obligations. Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible. Any national measures designed to realize the right to water should not interfere with the enjoyment of other human rights.

### **Legislation, strategies and policies**

46. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

47. The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy or plan of action to realize the right to water. The strategy must: (a) be based upon human rights law and principles; (b) cover all aspects of the right to water and the corresponding obligations of States parties; (c) define clear objectives; (d) set targets or goals to be achieved and the time frame for their achievement; (e) formulate adequate policies and corresponding benchmarks and indicators. The strategy should also establish institutional responsibility for the process; identify resources available to attain the objectives, targets and goals; allocate resources appropriately according to institutional responsibility; and establish accountability mechanisms to ensure the implementation of the strategy. When formulating and implementing their right to water national strategies, States parties should avail themselves of technical assistance and cooperation of the United Nations specialized agencies (see Part VI below).

48. The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people’s participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

50. States parties may find it advantageous to adopt framework legislation to operationalize their right to water strategy. Such legislation should include: (a) targets or goals to be attained and the time frame for their achievement; (b) the means by which the purpose could be achieved; (c) the intended collaboration with civil society, private sector and international organizations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedures.

51. Steps should be taken to ensure there is sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies. Where implementation of the right to water has been delegated to regional or local authorities, the State party still retains the responsibility to comply with its Covenant obligations, and therefore should ensure that these authorities have at their disposal sufficient resources to maintain and extend the necessary water services and facilities. The States parties must further ensure that such authorities do not deny access to services on a discriminatory basis.

52. States parties are obliged to monitor effectively the realization of the right to water. In monitoring progress towards the realization of the right to water, States parties should identify the factors and difficulties affecting implementation of their obligations.

### **Indicators and benchmarks**

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control. States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the International Labour Organization (ILO), the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the United Nations Commission on Human Rights.

54. Having identified appropriate right to water indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator.<sup>28</sup> During the periodic reporting procedure, the Committee will engage in a process of "scoping" with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of the right to water. Thereafter, in the subsequent reporting process,

the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered (see general comment No. 14 (2000), paragraph 58). Further, when setting benchmarks and preparing their reports, States parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.

### **Remedies and accountability**

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (see general comment No. 9 (1998), paragraph 4, and Principle 10 of the Rio Declaration on Environment and Development).<sup>29</sup> The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.

56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also general comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

57. The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant.

58. Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions.

59. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to water.

## **VI. OBLIGATIONS OF ACTORS OTHER THAN STATES**

60. United Nations agencies and other international organizations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Fund for Agricultural Development (IFAD), as well as international organizations concerned with trade such as the World Trade Organization (WTO), should cooperate effectively with States parties,



building on their respective expertise, in relation to the implementation of the right to water at the national level. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see general comment No. 2 (1990)), so that the enjoyment of the right to water is promoted. When examining the reports of States parties and their ability to meet the obligations to realize the right to water, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and principles in the programmes and policies by international organizations will greatly facilitate implementation of the right to water. The role of the International Federation of the Red Cross and Red Crescent Societies, International Committee of the Red Cross, the Office of the United Nations High Commissioner for Refugees (UNHCR), WHO and UNICEF, as well as non-governmental organizations and other associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies. Priority in the provision of aid, distribution and management of water and water facilities should be given to the most vulnerable or marginalized groups of the population.

### Notes

<sup>1</sup> In 2000, the World Health Organization estimated that 1.1 billion persons did not have access to an improved water supply (80 per cent of them rural dwellers) able to provide at least 20 litres of safe water per person a day; 2.4 billion persons were estimated to be without sanitation. (See WHO, *The Global Water Supply and Sanitation Assessment 2000*, Geneva, 2000, p. 1.) Further, 2.3 billion persons each year suffer from diseases linked to water: see United Nations, Commission on Sustainable Development, *Comprehensive Assessment of the Freshwater Resources of the World*, New York, 1997, p. 39.

<sup>2</sup> See paragraphs 5 and 32 of the Committee's general comment No. 6 (1995) on the economic, social and cultural rights of older persons.

<sup>3</sup> See general comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (a), (b) and (d), 15, 34, 36, 40, 43 and 51.

<sup>4</sup> See paragraph 8 (b) of general comment No. 4 (1991). See also the report by Commission on Human Rights' Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E/CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

<sup>5</sup> See article 14, paragraph 2 (h), Convention on the Elimination of All Forms of Discrimination Against Women; article 24, paragraph 2 (c), Convention on the Rights of the Child; articles 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; articles 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; articles 54 and 55 of Additional Protocol I thereto of 1977; articles 5 and 14 of Additional Protocol II of 1977; preamble, Mar Del Plata Action Plan

of the United Nations Water Conference; see paragraph 18.47 of Agenda 21, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II; Principle No. 3, The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (A/CONF.151/PC/112); Principle No. 2, Programme of Action, *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex; paragraphs 5 and 19, recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realization of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

<sup>6</sup> See also World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (c).

<sup>7</sup> This relates to both *availability* and to *accessibility* of the right to adequate food (see general comment No. 12 (1999), paragraphs 12 and 13).

<sup>8</sup> See also the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which declared that, in determining vital human needs in the event of conflicts over the use of watercourses “special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation”.

<sup>9</sup> See also paragraph 15, general comment No. 14.

<sup>10</sup> According to the WHO definition, vector-borne diseases include diseases transmitted by insects (malaria, filariasis, dengue, Japanese encephalitis and yellow fever), diseases for which aquatic snails serve as intermediate hosts (schistosomiasis) and zoonoses with vertebrates as reservoir hosts.

<sup>11</sup> For a definition of sustainability, see the *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.

<sup>12</sup> “Continuous” means that the regularity of the water supply is sufficient for personal and domestic uses.

<sup>13</sup> In this context, “drinking” means water for consumption through beverages and foodstuffs. “Personal sanitation” means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. “Food preparation” includes food hygiene and preparation of foodstuffs, whether water is incorporated into, or comes into contact with, food. “Personal and household hygiene” means personal cleanliness and hygiene of the household environment.

<sup>14</sup> See J. Bartram and G. Howard, “Domestic water quantity, service level and health: what should be the goal for water and health sectors”, WHO, 2002. See also P.H. Gleick, (1996) “Basic water requirements for human activities: meeting basic needs”, *Water International*, 21, pp. 83-92.

<sup>15</sup> The Committee refers States parties to WHO, *Guidelines for drinking water quality*, 2nd edition, vols. 1-3 (Geneva, 1993) that are “intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health”.

<sup>16</sup> See also general comment No. 4 (1991), paragraph 8 (b), general comment No. 13 (1999), paragraph 6 (a) and general comment No. 14 (2000), paragraphs 8 (a) and (b). Household includes a permanent or semi-permanent dwelling, or a temporary halting site.

<sup>17</sup> See paragraph 48 of this general comment.

<sup>18</sup> See articles 20, 26, 29 and 46 of the third Geneva Convention of 12 August 1949; articles 85, 89 and 127 of the fourth Geneva Convention of 12 August 1949; articles 15 and 20, paragraph 2, United Nations Standard Minimum Rules for the Treatment of Prisoners, in *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.88.XIV.1).

<sup>19</sup> See general comment No. 3 (1990), paragraph 9.

<sup>20</sup> For the interrelationship of human rights law and humanitarian law, the Committee notes the conclusions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly)*, *ICJ Reports (1996)* p. 226, paragraph 25.

<sup>21</sup> See articles 54 and 56, Additional Protocol I to the Geneva Conventions (1977), article 54, Additional Protocol II (1977), articles 20 and 46 of the third Geneva Convention of 12 August 1949, and common article 3 of the Geneva Conventions of 12 August 1949.

<sup>22</sup> See footnote 5 above, Agenda 21, chapters 5, 7 and 18; and the World Summit on Sustainable Development, Plan of Implementation (2002), paragraphs 6 (a), (l) and (m), 7, 36 and 38.

<sup>23</sup> See the Convention on Biological Diversity, the Convention to Combat Desertification, the United Nations Framework Convention on Climate Change, and subsequent protocols.

<sup>24</sup> Article 14, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates States parties shall ensure to women the right to “adequate living

conditions, particularly in relation to [...] sanitation”. Article 24, paragraph 2, of the Convention on the Rights of the Child requires States parties “To ensure that all segments of society [...] have access to education and are supported in the use of basic knowledge of [...] the advantages of [...] hygiene and environmental sanitation.”

<sup>25</sup> The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs: see articles 5, 7 and 10 of the Convention.

<sup>26</sup> In general comment No. 8 (1997), the Committee noted the disruptive effect of sanctions upon sanitation supplies and clean drinking water, and that sanctions regimes should provide for repairs to infrastructure essential to provide clean water.

<sup>27</sup> See paragraph 23 for a definition of “third parties”.

<sup>28</sup> See E. Riedel, “New bearings to the State reporting procedure: practical ways to operationalize economic social and cultural rights - The example of the right to health”, in S. von Schorlemer (ed.), *Praxishandbuch UNO*, 2002, pp. 345-358. The Committee notes, for example, the commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.

<sup>29</sup> Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*, see footnote 5 above), states with respect to environmental issues that “effective access to judicial and administrative proceedings, including remedy and redress, shall be provided”.

### **Thirty-fourth session (2005)**

#### **General comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)**

##### **Introduction**

1. The equal right of men and women to the enjoyment of all human rights is one of the fundamental principles recognized under international law and enshrined in the main international human rights instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR) protects human rights that are fundamental to the dignity of every person. In particular, article 3 of this Covenant provides for the equal right of men and women to the enjoyment of the rights it articulates. This provision is founded on Article 1, paragraph 3, of the United Nations Charter and article 2 of the Universal Declaration of Human Rights. Except for the reference to ICESCR, it is identical to article 3 of the International Covenant on Civil and Political Rights (ICCPR), which was drafted at the same time.

2. The *travaux préparatoires* state that article 3 was included in the Covenant, as well as in ICCPR, to indicate that beyond a prohibition of discrimination, “the same rights should be expressly recognized for men and women on an equal footing and suitable measures should be taken to ensure that women had the opportunity to exercise their rights ... Moreover, even if article 3 overlapped with article 2, paragraph 2, it was still necessary to reaffirm the equality rights between men and women. That fundamental principle, which was enshrined in the Charter of the United Nations, must be constantly emphasized, especially as there were still many prejudices preventing its full application”.<sup>1</sup> Unlike article 26 of ICCPR, articles 3 and 2, paragraph 2, of ICESCR are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed under part III of the Covenant.

3. Article 2, paragraph 2, of ICESCR provides for a guarantee of non-discrimination on the basis of sex among other grounds. This provision, and the guarantee of equal enjoyment of rights by men and women in article 3, are integrally related and mutually reinforcing. Moreover, the elimination of discrimination is fundamental to the enjoyment of economic, social and cultural rights on a basis of equality.

4. The Committee on Economic, Social and Cultural Rights (CESCR) has taken particular note of factors negatively affecting the equal right of men and women to the enjoyment of economic, social and cultural rights in many of its general comments, including those on the right to adequate housing,<sup>2</sup> the right to adequate food,<sup>3</sup> the right to education,<sup>4</sup> the right to the highest attainable standard of health,<sup>5</sup> and the right to water.<sup>6</sup> The Committee also routinely requests information on the equal enjoyment by men and women of the rights guaranteed under the Covenant in its list of issues in relation to States parties’ reports and during its dialogue with States parties.

5. Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage.<sup>7</sup>

## I. CONCEPTUAL FRAMEWORK

### A. Equality

6. The essence of article 3 of ICESCR is that the rights set forth in the Covenant are to be enjoyed by men and women on a basis of equality, a concept that carries substantive meaning. While expressions of formal equality may be found in constitutional provisions, legislation and policies of Governments, article 3 also mandates the equal enjoyment of the rights in the Covenant for men and women in practice.

7. The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts. Formal equality

assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.

8. Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, *prima facie*, gender-neutral. In implementing article 3, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.

9. According to article 3, States parties must respect the principle of equality in and before the law. The principle of equality in the law must be respected by the legislature when adopting laws, by ensuring that those laws further equal enjoyment of economic, social and cultural rights by men and women. The principle of equality before the law must be respected by administrative agencies, and courts and tribunals, and implies that those authorities must apply the law equally to men and women.

## **B. Non-discrimination**

10. The principle of non-discrimination is the corollary of the principle of equality. Subject to what is stated in paragraph 15 below on temporary special measures, it prohibits differential treatment of a person or group of persons based on his/her or their particular status or situation, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status.

11. Discrimination against women is “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.<sup>8</sup> Discrimination on the basis of sex may be based on the differential treatment of women because of their biology, such as refusal to hire women because they could become pregnant; or stereotypical assumptions, such as tracking women into low-level jobs on the assumption that they are unwilling to commit as much time to their work as men.

12. Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women, which cannot be justified objectively.

13. Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities. Applying a gender-neutral law may leave the existing inequality in place, or exacerbate it.

14. Gender affects the equal right of men and women to the enjoyment of their rights. Gender refers to cultural expectations and assumptions about the behaviour, attitudes, personality traits, and physical and intellectual capacities of men and women, based solely on their identity as men or women. Gender-based assumptions and expectations generally place women at a disadvantage with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development, and to make decisions concerning their circumstances and conditions. Gender-based assumptions about economic, social and cultural roles preclude the sharing of responsibility between men and women in all spheres that is necessary to equality.

### **C. Temporary special measures**

15. The principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others. Temporary special measures aim at realizing not only de jure or formal equality, but also de facto or substantive equality for men and women. However, the application of the principle of equality will sometimes require that States parties take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination. As long as these measures are necessary to redress de facto discrimination and are terminated when de facto equality is achieved, such differentiation is legitimate.<sup>9</sup>

## **II. STATES PARTIES' OBLIGATIONS**

### **A. General legal obligations**

16. The equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.<sup>10</sup>

17. The equal right of men and women to the enjoyment of economic, social and cultural rights, like all human rights, imposes three levels of obligations on States parties - the obligation to respect, to protect and to fulfil. The obligation to fulfil further contains duties to provide, promote and facilitate.<sup>11</sup> Article 3 sets a non-derogable standard for compliance with the obligations of States parties as set out in articles 6 through 15 of ICESCR.

### **B. Specific legal obligations**

#### **1. Obligation to respect**

18. The obligation to respect requires States parties to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of economic, social and cultural rights. Respecting the right obliges States parties not to adopt, and to repeal laws and rescind, policies, administrative measures and programmes that do not conform with the right protected by article 3. In particular, it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality.

## **2. Obligation to protect**

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

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

## **3. Obligation to fulfil**

21. The obligation to fulfil requires States parties to take steps to ensure that in practice, men and women enjoy their economic, social and cultural rights on a basis of equality. Such steps should include:

- To make available and accessible appropriate remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition, declarations, public apologies, educational programmes and prevention programmes;
- To establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women;
- To develop monitoring mechanisms to ensure that the implementation of laws and policies aimed at promoting the equal enjoyment of economic, social and cultural rights by men and women do not have unintended adverse effects on disadvantaged or marginalized individuals or groups, particularly women and girls;
- To design and implement policies and programmes to give long-term effect to the economic, social and cultural rights of both men and women on the basis of equality. These may include the adoption of temporary special measures to accelerate women's equal enjoyment of their rights, gender audits, and gender-specific allocation of resources;
- To conduct human rights education and training programmes for judges and public officials;



- To conduct awareness-raising and training programmes on equality for workers involved in the realization of economic, social and cultural rights at the grass-roots level;
- To integrate, in formal and non-formal education, the principle of the equal right of men and women to the enjoyment of economic, social and cultural rights, and to promote equal participation of men and women, boys and girls, in schools and other education programmes;
- To promote equal representation of men and women in public office and decision-making bodies;
- To promote equal participation of men and women in development planning, decision-making and in the benefits of development and all programmes related to the realization of economic, social and cultural rights.

### **C. Specific examples of States parties' obligations**

22. Article 3 is a cross-cutting obligation and applies to all the rights contained in articles 6 to 15 of the Covenant. It requires addressing gender-based social and cultural prejudices, providing for equality in the allocation of resources, and promoting the sharing of responsibilities in the family, community and public life. The examples provided in the following paragraphs may be taken as guidance on the ways in which article 3 applies to other rights in the Covenant, but are not intended to be exhaustive.

23. Article 6, paragraph 1, of the Covenant requires States parties to safeguard the right of everyone to the opportunity to gain a living by work which is freely chosen or accepted and to take the necessary steps to achieve the full realization of this right. Implementing article 3, in relation to article 6, requires *inter alia*, that in law and in practice, men and women have equal access to jobs at all levels and all occupations and that vocational training and guidance programmes, in both the public and private sectors, provide men and women with the skills, information and knowledge necessary for them to benefit equally from the right to work.

24. Article 7 (a) of the Covenant requires States parties to recognize the right of everyone to enjoy just and favourable conditions of work and to ensure, among other things, fair wages and equal pay for work of equal value. Article 3, in relation to article 7 requires, *inter alia*, that the State party identify and eliminate the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. Furthermore, the State party should monitor compliance by the private sector with national legislation on working conditions through an effectively functioning labour inspectorate. The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.

25. Article 8, paragraph 1 (a), of the Covenant requires States parties to ensure the right of everyone to form and join trade unions of his or her choice. Article 3, in relation to article 8, requires allowing men and women to organize and join workers' associations that address their specific concerns. In this regard, particular attention should be given to domestic workers, rural women, women working in female-dominated industries and women working at home, who are often deprived of this right.

26. Article 9 of the Covenant requires that States parties recognize the right of everyone to social security, including social insurance, and to equal access to social services. Implementing article 3, in relation to article 9, requires, inter alia, equalizing the compulsory retirement age for both men and women; ensuring that women receive the equal benefit of public and private pension schemes; and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.

27. Article 10, paragraph 1, of the Covenant requires that States parties recognize that the widest possible protection and assistance should be accorded to the family, and that marriage must be entered into with the free consent of the intending spouses. Implementing article 3, in relation to article 10, requires States parties, inter alia, to provide victims of domestic violence, who are primarily female, with access to safe housing, remedies and redress for physical, mental and emotional damage; to ensure that men and women have an equal right to choose if, whom and when to marry - in particular, the legal age of marriage for men and women should be the same, and boys and girls should be protected equally from practices that promote child marriage, marriage by proxy, or coercion; and to ensure that women have equal rights to marital property and inheritance upon their husband's death. Gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality. States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.

28. Article 11 of the Covenant requires States parties to recognize the right of everyone to an adequate standard of living for him/herself and his/her family, including adequate housing (para. 1) and adequate food (para. 2). Implementing article 3, in relation to article 11, paragraph 1, requires that women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so. Implementing article 3, in relation to article 11, paragraph 2, also requires States parties, inter alia, to ensure that women have access to or control over means of food production, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.<sup>12</sup>

29. Article 12 of the Covenant requires States parties to undertake steps towards the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The implementation of article 3, in relation to article 12, requires at a minimum the removal of legal and other obstacles that prevent men and women from accessing and benefiting from health care on a basis of equality. This includes, inter alia, addressing the ways in which gender roles affect access to determinants of health, such as water and food; the removal of legal restrictions on reproductive health provisions; the prohibition of female genital mutilation; and the provision of adequate training for health-care workers to deal with women's health issues.<sup>13</sup>

30. Article 13, paragraph 1, of the Covenant requires States parties to recognize the right of everyone to education and in paragraph 2 (a) stipulates that primary education shall be compulsory and available free to all. Implementing article 3, in relation to article 13, requires, *inter alia*, the adoption of legislation and policies to ensure the same admission criteria for boys and girls at all levels of education. States parties should ensure, in particular through information and awareness-raising campaigns, that families desist from giving preferential treatment to boys when sending their children to school, and that curricula promote equality and non-discrimination. States parties must create favourable conditions to ensure the safety of children, in particular girls, on their way to and from school.

31. Article 15, paragraph 1 (a) and (b), of the Covenant require States parties to recognize the right of everyone to take part in cultural life and to enjoy the benefits of scientific progress. Implementing article 3, in relation to article 15, paragraph 1 (a) and (b), requires, *inter alia*, overcoming institutional barriers and other obstacles, such as those based on cultural and religious traditions, which prevent women from fully participating in cultural life, science education and scientific research, and directing resources to scientific research relating to the health and economic needs of women on an equal basis with those of men.

### **III. IMPLEMENTATION AT THE NATIONAL LEVEL**

#### **A. Policies and strategies**

32. The most appropriate ways and means of implementing the right under article 3 of the Covenant will vary from one State party to another. Every State party has a margin of discretion in adopting appropriate measures in complying with its primary and immediate obligation to ensure the equal right of men and women to the enjoyment of all their economic, social and cultural rights. Among other things, States parties must, integrate into national plans of action for human rights appropriate strategies to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.

33. These strategies should be based on the systematic identification of policies, programmes and activities relevant to the situation and context within the State, as derived from the normative content of article 3 of the Covenant and spelled out in relation to the levels and nature of States parties' obligations referred to in paragraphs 16 to 21 above. The strategies should give particular attention to the elimination of discrimination in the enjoyment of economic, social and cultural rights.

34. States parties should periodically review existing legislation, policies, strategies and programmes in relation to economic, social and cultural rights, and adopt any necessary changes to ensure that they are consonant with their obligations under article 3 of the Covenant.

35. The adoption of temporary special measures may be necessary to accelerate the equal enjoyment by women of all economic, social and cultural rights and to improve the *de facto* position of women.<sup>14</sup> Temporary special measures should be distinguished from permanent policies and strategies undertaken to achieve equality of men and women.

36. States parties are encouraged to adopt temporary special measures to accelerate the achievement of equality between men and women in the enjoyment of the rights under the Covenant. Such measures are not to be considered discriminatory in themselves as they are grounded in the State's obligation to eliminate disadvantage caused by past and current discriminatory laws, traditions and practices. The nature, duration and application of such measures should be designed with reference to the specific issue and context, and should be adjusted as circumstances require. The results of such measures should be monitored with a view to being discontinued when the objectives for which they are undertaken have been achieved.

37. The right of individuals and groups of individuals to participate in decision-making processes that may affect their development must be an integral component of any policy, programme or activity developed to discharge governmental obligations under article 3 of the Covenant.

### **B. Remedies and accountability**

38. National policies and strategies should provide for the establishment of effective mechanisms and institutions where they do not exist, including administrative authorities, ombudsmen and other national human rights institutions, courts and tribunals. These institutions should investigate and address alleged violations relating to article 3 and provide remedies for such violations. States parties, for their part, should ensure that such remedies are effectively implemented.

### **C. Indicators and benchmarks**

39. National policies and strategies should identify appropriate indicators and benchmarks on the right to equal enjoyment by men and women of economic, social and cultural rights in order to effectively monitor the implementation by the State party of its obligations under the Covenant in this regard. Disaggregated statistics, provided within specific time frames, are necessary to measure the progressive realization of economic, social and cultural rights by men and women, where appropriate.

## **IV. VIOLATIONS**

40. States parties must fulfil their immediate and primary obligation to ensure the equal right of men and women to the enjoyment of economic, social and cultural rights.

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

42. Violations of the rights contained in the Covenant can occur through the direct action of, failure to act or omission by States parties, or through their institutions or agencies at the national and local levels. The adoption and undertaking of any retrogressive measures that affect the equal right of men and women to the enjoyment of the all the rights set forth in the Covenant constitutes a violation of article 3.

### Notes

<sup>1</sup> Draft International Covenants on Human Rights Report of the Third Committee. A/53/65 (17 December 1962), para. 85.

<sup>2</sup> Committee on Economic, Social and Cultural Rights (hereinafter CESCR), general comment No. 4 (1991): The right to adequate housing (article 11, paragraph 1 of the Covenant) para 6; general comment No. 7 (1997): The right to adequate housing (article 11, paragraph 1 of the Covenant): Forced evictions, para. 10.

<sup>3</sup> CESCR, general comment No. 12 (1999): The right to adequate food (article 11 of the Covenant), para. 26.

<sup>4</sup> CESCR, general comment No. 11 (1999): Plans for primary education (article 14 of the Covenant), para. 3; general comment No. 13 (1999): The right to education (article 13 of the Covenant), paras. 6 (b), 31 and 32.

<sup>5</sup> CESCR, general comment No. 14 (2000): The right to the highest attainable standard of health (article 12 of the Covenant), paras. 18-22.

<sup>6</sup> CESCR, general comment No. 15 (2000): The right to water (articles 11 and 12 of the Covenant), paras. 13 and 14.

<sup>7</sup> Cf. Committee on the Elimination of Racial Discrimination, general comment XXV (2000): Gender-related dimensions of racial discrimination.

<sup>8</sup> As defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>9</sup> However, there is one exception to this general principle: reasons specific to an individual male candidate may tilt the balance in his favour, which is to be assessed objectively, taking into account all criteria pertaining to the individual candidates. This is a requirement of the principle of proportionality.

<sup>10</sup> CESCR, general comment No. 3 (1990): The nature of States parties obligations (art. 2, para. 2).

<sup>11</sup> According to CESCR general comment Nos. 12 and 13, the obligation to fulfil incorporates an obligation to facilitate and an obligation to provide. In the present general comment, the obligation to fulfil also incorporates an obligation to promote the elimination of all forms of discrimination against women.

<sup>12</sup> Other examples of obligations and possible violations of article 3 in relation to article 11 (1) and (2) are further discussed in CESCR general comment No. 12, para. 26.

<sup>13</sup> CESCR general comment No. 14, paras. 18-21.

<sup>14</sup> Reference is made in this regard to general recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women (CEDAW), CESCR general comment No. 13 and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.

### **Thirty-fifth session (2005)**

#### **General comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15)**

##### **I. INTRODUCTION AND BASIC PREMISES**

1. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1 (c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.

2. In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person. Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments. Moreover, the scope of protection of the moral and material interests of the author provided for by article 15, paragraph 1 (c), does not necessarily coincide with what is referred to as intellectual property rights under national legislation or international agreements.<sup>1</sup>

3. It is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c). The human right to benefit from the protection of the moral and material interests of the author is recognized in a number of international instruments. In identical language, article 27, paragraph 2, of the Universal Declaration of Human Rights provides: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” Similarly, this right is recognized in regional human rights instruments, such as article 13, paragraph 2, of the American Declaration of the Rights and Duties of Man of 1948, article 14, paragraph 1 (c), of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (“Protocol of San Salvador”) and, albeit not explicitly, in article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1952 (European Convention on Human Rights).

4. The right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary and artistic productions seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole. As such, it is intrinsically linked to the other rights recognized in article 15 of the Covenant, i.e. the right to take part in cultural life (art. 15, para. 1 (a)), the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)), and the freedom indispensable for scientific research and creative activity (art. 15, para. 3). The relationship between these rights and article 15, paragraph 1 (c), is at the same time mutually reinforcing and reciprocally limitative. The limitations imposed on the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions by virtue of these rights will partly be explored in this general comment, partly in separate general comments on article 15, paragraphs 1 (a) and (b) and 3, of the Covenant. As a material safeguard for the freedom of scientific research and creative activity, guaranteed under article 15, paragraph 3 and article 15, paragraph 1 (c), also has an economic dimension and is, therefore, closely linked to the rights to the opportunity to gain one’s living by work which one freely chooses (art. 6, para. 1) and to adequate remuneration (art. 7 (a)), and to the human right to an adequate standard of living (art. 11, para. 1). Moreover, the realization of article 15, paragraph 1 (c), is dependent on the enjoyment of other human rights guaranteed in the International Bill of Human Rights and other international and regional instruments, such as the right to own property alone as well as in association with others,<sup>2</sup> the freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds,<sup>3</sup> the right to the full development of the human personality,<sup>4</sup> and rights of cultural participation,<sup>5</sup> including cultural rights of specific groups.<sup>6</sup>

5. With a view to assisting States parties’ implementation of the Covenant and fulfilment of their reporting obligations, this general comment focuses on the normative content of article 15, paragraph 1 (c) (Part I), States parties’ obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V.

## **II. NORMATIVE CONTENT OF ARTICLE 15, PARAGRAPH 1 (c)**

6. Article 15, paragraph 1, enumerates, in three paragraphs, three rights covering different aspects of cultural participation, including the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of

which he or she is the author (art. 15, para. 1 (c)), without explicitly defining the content and scope of this right. Therefore, each of the elements of article 15, paragraph 1 (c), requires interpretation.

### **Elements of article 15, paragraph 1 (c)**

#### **“Author”**

7. The Committee considers that only the “author”, namely the creator, whether man or woman, individual or group of individuals,<sup>7</sup> of scientific, literary or artistic productions, such as, inter alia, writers and artists, can be the beneficiary of the protection of article 15, paragraph 1 (c). This follows from the words “everyone”, “he” and “author”, which indicate that the drafters of that article seemed to have believed authors of scientific, literary or artistic productions to be natural persons,<sup>8</sup> without at that time realizing that they could also be groups of individuals. Under the existing international treaty protection regimes, legal entities are included among the holders of intellectual property rights. However, as noted above, their entitlements, because of their different nature, are not protected at the level of human rights.<sup>9</sup>

8. Although the wording of article 15, paragraph 1 (c), generally refers to the individual creator (“everyone”, “he”, “author”), the right to benefit from the protection of the moral and material interests resulting from one’s scientific, literary or artistic productions can, under certain circumstances, also be enjoyed by groups of individuals or by communities.<sup>10</sup>

#### **“Any scientific, literary or artistic production”**

9. The Committee considers that “any scientific, literary or artistic production”, within the meaning of article 15, paragraph 1 (c), refers to creations of the human mind, that is to “scientific productions”, such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and “literary and artistic productions”, such as, inter alia, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions.

#### **“Benefit from the protection”**

10. The Committee considers that article 15, paragraph 1 (c), recognizes the right of authors to benefit from some kind of protection of the moral and material interests resulting from their scientific, literary or artistic productions, without specifying the modalities of such protection. In order not to render this provision devoid of any meaning, the protection afforded needs to be effective in securing for authors the moral and material interests resulting from their productions. However, the protection under article 15, paragraph 1 (c), need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes, as long as the protection available is suited to secure for authors the moral and material interests resulting from their productions, as defined in paragraphs 12 to 16 below.

11. The Committee observes that, by recognizing the right of everyone to “benefit from the protection” of the moral and material interests resulting from one’s scientific, literary or artistic productions, article 15, paragraph 1 (c), by no means prevents States parties from adopting



higher protection standards in international treaties on the protection of the moral and material interests of authors or in their domestic laws,<sup>11</sup> provided that these standards do not unjustifiably limit the enjoyment by others of their rights under the Covenant.<sup>12</sup>

### **“Moral interests”**

12. The protection of the “moral interests” of authors was one of the main concerns of the drafters of article 27, paragraph 2, of the Universal Declaration of Human Rights: “Authors of all artistic, literary, scientific works and inventors shall retain, in addition to just remuneration of their labour, a moral right on their work and/or discovery which shall not disappear, even after such a work shall have become the common property of mankind.”<sup>13</sup> Their intention was to proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations.

13. In line with the drafting history of article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the Covenant, the Committee considers that “moral interests” in article 15, paragraph 1 (c), include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honour and reputation.<sup>14</sup>

14. The Committee stresses the importance of recognizing the value of scientific, literary and artistic productions as expressions of the personality of their creator, and notes that protection of moral interests can be found, although to a varying extent, in most States, regardless of the legal system in force.

### **“Material interests”**

15. The protection of “material interests” of authors in article 15, paragraph 1 (c), reflects the close linkage of this provision with the right to own property, as recognized in article 17 of the Universal Declaration of Human Rights and in regional human rights instruments, as well as with the right of any worker to adequate remuneration (art. 7 (a)). Unlike other human rights, the material interests of authors are not directly linked to the personality of the creator, but contribute to the enjoyment of the right to an adequate standard of living (art. 11, para. 1).

16. The term of protection of material interests under article 15, paragraph 1 (c), need not extend over the entire lifespan of an author. Rather, the purpose of enabling authors to enjoy an adequate standard of living can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his scientific, literary or artistic production.

### **“Resulting”**

17. The word “resulting” stresses that authors only benefit from the protection of such moral and material interests which are directly generated by their scientific, literary or artistic productions.

### **Conditions for States parties' compliance with article 15, paragraph 1 (c)**

18. The right to the protection of the moral and material interests of authors contains the following essential and interrelated elements, the precise application of which will depend on the economic, social and cultural conditions prevailing in a particular State party:

(a) *Availability*. Adequate legislation and regulations, as well as effective administrative, judicial or other appropriate remedies, for the protection of the moral and material interests of authors must be available within the jurisdiction of the States parties;

(b) *Accessibility*. Administrative, judicial or other appropriate remedies for the protection of the moral and material interests resulting from scientific, literary or artistic productions must be accessible to all authors. Accessibility has four overlapping dimensions:

- (i) *Physical accessibility*: national courts and agencies responsible for the protection of the moral and material interests resulting from the scientific, literary or artistic productions of authors must be at the disposal of all segments of society, including authors with disabilities;
- (ii) *Economic accessibility (affordability)*: access to such remedies must be affordable for all, including disadvantaged and marginalized groups. For example, where a State party decides to meet the requirements of article 15, paragraph 1 (c), through traditional forms of intellectual property protection, related administrative and legal costs must be based on the principle of equity, ensuring that these remedies are affordable for all;
- (iii) *Accessibility of information*: accessibility includes the right to seek, receive and impart information on the structure and functioning of the legal or policy regime to protect the moral and material interests of authors resulting from their scientific, literary and artistic productions, including information on relevant legislation and procedures. Such information should be understandable to everyone and should be published also in the languages of linguistic minorities and indigenous peoples;

(c) *Quality of protection*. Procedures for the protection of the moral and material interests of authors should be administered competently and expeditiously by judges and other relevant authorities.

### **Special topics of broad application**

#### **Non-discrimination and equal treatment**

19. Article 2, paragraph 2, and article 3 of the Covenant prohibit any discrimination in the access to an effective protection of the moral and material interests of authors, including administrative, judicial and other remedies, on the grounds of race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right as recognized in article 15, paragraph 1 (c).<sup>15</sup>

20. The Committee stresses that the elimination of discrimination to ensure equal access to an effective protection of the moral and material interests of authors can often be achieved with limited resources through the adoption or amendment or abrogation of legislation or through the dissemination of information. The Committee recalls general comment No. 3 (1990) on the nature of States parties' obligations, paragraph 12, which states that even in times of severe resource constraints, the disadvantaged and marginalized individuals and groups of society must be protected by the adoption of relatively low-cost targeted programmes.

21. The adoption of temporary special measures taken for the sole purpose of securing de facto equality for disadvantaged or marginalized individuals or groups, as well as those subjected to discrimination is not a violation of the right to benefit from the protection of the moral and material interests of the author, provided that such measures do not perpetuate unequal or separate protection standards for different individuals or groups and are discontinued once the objectives for which they were adopted are achieved.

### **Limitations**

22. The right to the protection of the moral and material interests resulting from one's scientific, literary and artistic productions is subject to limitations and must be balanced with the other rights recognized in the Covenant.<sup>16</sup> However, limitations on the rights protected under article 15, paragraph 1 (c), must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant.

23. Limitations must therefore be proportionate, meaning that the least restrictive measures must be adopted when several types of limitations may be imposed. Limitations must be compatible with the very nature of the rights protected in article 15, paragraph 1 (c), which lies in the protection of the personal link between the author and his/her creation and of the means which are necessary to enable authors to enjoy an adequate standard of living.

24. The imposition of limitations may, under certain circumstances, require compensatory measures, such as payment of adequate compensation<sup>17</sup> for the use of scientific, literary or artistic productions in the public interest.

## **III. STATES PARTIES' OBLIGATIONS**

### **General legal obligations**

25. While the Covenant provides for progressive realization and acknowledges constraints based on limits of available resources (art. 2, para. 1), it also imposes on States parties various obligations that are of an immediate effect, including core obligations. Steps taken to fulfil obligations must be deliberate, concrete and targeted towards the full realization of the right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which he or she is the author.<sup>18</sup>

26. The progressive realization of that right over a period of time means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 15, paragraph 1 (c).<sup>19</sup>

27. As in the case of all other rights contained in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to the protection of the moral and material interests of authors are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after careful consideration of all alternatives and that they are duly justified in the light of the totality of the rights recognized in the Covenant.<sup>20</sup>

28. The right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which he or she is the author, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. The obligation to *respect* requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right to benefit from the protection of the moral and material interests of the author. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the moral and material interests of authors. Finally, the obligation to *fulfil* requires States parties to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of article 15, paragraph 1 (c).<sup>21</sup>

29. The full realization of article 15, paragraph 1 (c), requires measures necessary for the conservation, development and diffusion of science and culture. This follows from article 15, paragraph 2, of the Covenant, which defines obligations that apply to each aspect of the rights recognized in article 15, paragraph 1, including the right of authors to benefit from the protection of their moral and material interests.

### **Specific legal obligations**

30. States parties are under an obligation to *respect* the human right to benefit from the protection of the moral and material interests of authors by, inter alia, abstaining from 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. States parties must abstain from unjustifiably interfering with the material interests of authors, which are necessary to enable those authors to enjoy an adequate standard of living.

31. Obligations to *protect* include the duty of States parties to ensure the effective protection of the moral and material interests of authors against infringement by third parties. In particular, States parties must prevent third parties from infringing the right of authors to claim authorship of their scientific, literary or artistic productions, and from distorting, mutilating or otherwise modifying, or taking any derogatory action in relation to such productions in a manner that would be prejudicial to the author's honour or reputation. Similarly, States parties are obliged to prevent third parties from infringing the material interests of authors resulting from their productions. To that effect, States parties must prevent the unauthorized use of scientific, literary and artistic productions that are easily accessible or reproducible through modern

communication and reproduction technologies, e.g. by establishing systems of collective administration of authors' rights or by adopting legislation requiring users to inform authors of any use made of their productions and to remunerate them adequately. States parties must ensure that third parties adequately compensate authors for any unreasonable prejudice suffered as a consequence of the unauthorized use of their productions.

32. With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.

33. States parties in which ethnic, religious or linguistic minorities exist are under an obligation to protect the moral and material interests of authors belonging to these minorities through special measures to preserve the distinctive character of minority cultures.<sup>22</sup>

34. The obligation to *fulfil* (provide) requires States parties to provide administrative, judicial or other appropriate remedies in order to enable authors to claim the moral and material interests resulting from their scientific, literary or artistic productions and to seek and obtain effective redress in cases of violation of these interests.<sup>23</sup> States parties are also required to *fulfil* (facilitate) the right in article 15, paragraph 1 (c), e.g. by taking financial and other positive measures which facilitate the formation of professional and other associations representing the moral and material interests of authors, including disadvantaged and marginalized authors, in line with article 8, paragraph 1 (a), of the Covenant.<sup>24</sup> The obligation to *fulfil* (promote) requires States parties to ensure the right of authors of scientific, literary and artistic productions to take part in the conduct of public affairs and in any significant decision-making processes that have an impact on their rights and legitimate interests, and to consult these individuals or groups or their elected representatives prior to the adoption of any significant decisions affecting their rights under article 15, paragraph 1 (c).<sup>25</sup>

### **Related obligations**

35. The right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant. States parties are therefore obliged to strike an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant. In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their

productions should be given due consideration.<sup>26</sup> States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.<sup>27</sup> Ultimately, intellectual property is a social product and has a social function.<sup>28</sup> States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights.<sup>29</sup> States parties should, in particular, consider to what extent the patenting of the human body and its parts would affect their obligations under the Covenant or under other relevant international human rights instruments.<sup>30</sup> States parties should also consider undertaking human rights impact assessments prior to the adoption and after a period of implementation of legislation for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions.

### **International obligations**

36. In its general comment No. 3 (1990), the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as the specific provisions of the Covenant (arts. 2, para. 1, 15, para. 44 and 23), States parties should recognize the essential role of international cooperation for the achievement of the rights recognized in the Covenant, including the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions, and should comply with their commitment to take joint and separate action to that effect. International cultural and scientific cooperation should be carried out in the common interest of all peoples.

37. The Committee recalls that, in accordance with Articles 55 and 56 of the Charter of the United Nations, well-established principles of international law, and the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States parties and, in particular, of States which are in a position to assist.<sup>31</sup>

38. Bearing in mind the different levels of development of States parties, it is essential that any system for the protection of the moral and material interests resulting from one's scientific, literary and artistic productions facilitates and promotes development cooperation, technology transfer, and scientific and cultural cooperation,<sup>32</sup> while at the same time taking due account of the need to preserve biological diversity.<sup>33</sup>

### **Core obligations**

39. In general comment No. 3 (1990), the Committee confirmed that States parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights enunciated in the Covenant. In conformity with other human rights instruments, as well as international agreements on the protection of the moral and material interests resulting from one's scientific, literary or artistic productions, the Committee considers that article 15, paragraph 1 (c), of the Covenant entails at least the following core obligations, which are of immediate effect:

(a) To take legislative and other necessary steps to ensure the effective protection of the moral and material interests of authors;

(b) To protect the rights of authors to be recognized as the creators of their scientific, literary and 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;

(c) To respect and protect the basic material interests of authors resulting from their scientific, literary or artistic productions, which are necessary to enable those authors to enjoy an adequate standard of living;

(d) To ensure equal access, particularly for authors belonging to disadvantaged and marginalized groups, to administrative, judicial or other appropriate remedies enabling authors to seek and obtain redress in case their moral and material interests have been infringed;

(e) To strike an adequate balance between the effective protection of the moral and material interests of authors and States parties' obligations in relation to the rights to food, health and education, as well as the rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right recognized in the Covenant.

40. The Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical", which enable developing countries to fulfil their obligations indicated in paragraph 36 above.

## **IV. VIOLATIONS**

41. In determining which actions or omissions by States parties amount to a violation of the right to the protection of the moral and material interests of authors, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 15, paragraph 1 (c). This follows from article 2, paragraph 1, of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions is in violation of its obligations under article 15, paragraph 1 (c). If resource constraints render it impossible for a State to comply fully

with its obligations under the Covenant, it has the burden of justifying that every effort has been made to use all available resources at its disposal to satisfy, as a matter of priority, the core obligations outlined above.

42. Violations of the right to benefit from the protection of the moral and material interests of authors can occur through the direct action of States parties or of other entities insufficiently regulated by States parties. The adoption of any retrogressive measures incompatible with the core obligations under article 15, paragraph 1 (c), outlined in paragraph 39 above, constitutes a violation of that right. Violations through acts of commission include the formal repeal or unjustifiable suspension of legislation protecting the moral and material interests resulting from one's scientific, literary and artistic productions.

43. Violations of article 15, paragraph 1 (c), can also occur through the omission or failure of States parties to take necessary measures to comply with its legal obligations under that provision. Violations through omission include the failure to take appropriate steps towards the full realization of the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic productions and the failure to enforce relevant laws or to provide administrative, judicial or other appropriate remedies enabling authors to assert their rights under article 15, paragraph 1 (c).

#### **Violations of the obligation to respect**

44. Violations of the obligation to *respect* include State actions, policies or laws which have the effect of infringing the right of authors to be recognized as the creators of their scientific, literary and 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; denying authors access to administrative, judicial or other appropriate remedies to seek redress in case their moral and material interests have been violated; and discriminating against individual authors in relation to the protection of their moral and material interests.

#### **Violations of the obligation to protect**

45. Violations of the obligation to *protect* follow from the failure of a State to take all necessary measures to safeguard authors within their jurisdiction from infringements of their moral and material interests by third parties. This category includes such omissions as the failure to enact and/or enforce legislation prohibiting any use of scientific, literary or artistic productions that is incompatible with the right of authors to be recognized as the creator of their productions or that distorts, mutilates or otherwise modifies, or is derogatory towards, such productions in a manner that would be prejudicial to their honour or reputation or that unjustifiably interferes with those material interests that are necessary to enable authors to enjoy an adequate standard of living; and the failure to ensure that third parties adequately compensate authors, including indigenous authors, for any unreasonable prejudice suffered as a consequence of the unauthorized use of their scientific, literary and artistic productions.



## **Violations of the obligation to fulfil**

46. Violations of the obligation to *fulfil* occur when States parties fail to take all necessary steps within their available resources to promote the realization of the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary or artistic productions. Examples include the failure to provide administrative, judicial or other appropriate remedies enabling authors, especially those belonging to disadvantaged and marginalized groups, to seek and obtain redress in case their moral and material interests have been infringed, or the failure to provide adequate opportunities for the active and informed participation of authors and groups of authors in any decision-making process that has an impact on their right to benefit from the protection of the moral and material interests resulting from their scientific, literary or artistic productions.

## **V. IMPLEMENTATION AT THE NATIONAL LEVEL**

### **National legislation**

47. The most appropriate measures to implement the right to the protection of the moral and material interests of the author will vary significantly from one State to another. Every State has a considerable margin of discretion in assessing which measures are most suitable to meet its specific needs and circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has equal access to effective mechanisms for the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.

48. National laws and regulations for the protection of the moral and material interests of the author should be based on the principles of accountability, transparency and independence of the judiciary, since these principles are essential to the effective implementation of all human rights, including article 15, paragraph 1 (c). In order to create a favourable climate for the realization of that right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the effects on the enjoyment of other human rights of the right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions. In monitoring progress towards the realization of article 15, paragraph 1 (c), States parties should identify the factors and difficulties affecting implementation of their obligations.

### **Indicators and benchmarks**

49. States parties should identify appropriate indicators and benchmarks designed to monitor, at the national and international levels, States parties' obligations under article 15, paragraph 1 (c). States parties may obtain guidance on appropriate indicators, which should address different aspects of the right to the protection of the moral and material interests of the author, from the World Intellectual Property Organization (WIPO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other specialized agencies and programmes within the United Nations system that are concerned with the protection of scientific, literary and artistic productions. Such indicators must be disaggregated on the basis of the prohibited grounds of discrimination, and cover a specified time frame.

50. Having identified appropriate indicators in relation to article 15, paragraph 1 (c), States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure, the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks, which will then provide the targets to be achieved by the State party during the next reporting cycle. During that period, the State party will use these national benchmarks to monitor its implementation of article 15, paragraph 1 (c). Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and any difficulties that may have been encountered.

### **Remedies and accountability**

51. The human right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author should be adjudicated by competent judicial and administrative bodies. Indeed, effective protection of the moral and material interests of authors resulting from their scientific, literary and artistic productions would be hardly conceivable without the possibility of availing oneself of administrative, judicial or other appropriate remedies.<sup>34</sup>

52. All authors who are victims of a violation of the protected moral and material interests resulting from their scientific, literary or artistic productions should, consequently, have access to effective administrative, judicial or other appropriate remedies at the national level. Such remedies should not be unreasonably complicated or costly, or entail unreasonable time limits or unwarranted delays.<sup>35</sup> Parties to legal proceedings should have the right to have these proceedings reviewed by a judicial or other competent authority.<sup>36</sup>

53. All victims of violations of the rights protected under article 15, paragraph 1 (c), should be entitled to adequate compensation or satisfaction.

54. National ombudsmen, human rights commissions, where they exist, and professional associations of authors or similar institutions should address violations of article 15, paragraph 1 (c).

## **VI. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES**

55. While only States parties to the Covenant are held accountable for compliance with its provisions, they are nevertheless urged to consider regulating the responsibility resting on the private business sector, private research institutions and other non-State actors to respect the rights recognized in article 15, paragraph 1 (c), of the Covenant.

56. The Committee notes that, as members of international organizations such as WIPO, UNESCO, the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO), and the World Trade Organization (WTO), States parties have an obligation to take whatever measures they can to ensure that the policies and decisions of those organizations are in conformity with their obligations under the Covenant, in particular the obligations contained in articles 2, paragraph 1, 15, paragraph 4, 22 and 23 concerning international assistance and cooperation.<sup>37</sup>

57. United Nations organs, as well as specialized agencies, should, within their fields of competence and in accordance with articles 22 and 23 of the Covenant, take international measures likely to contribute to the effective implementation of article 15, paragraph 1 (c). In particular, WIPO, UNESCO, FAO, WHO and other relevant agencies, organs and mechanisms of the United Nations are called upon to intensify their efforts to take into account human rights principles and obligations in their work concerning the protection of the moral and material benefits resulting from one's scientific, literary and artistic productions, in cooperation with the Office of the High Commissioner for Human Rights.

### Notes

<sup>1</sup> Relevant international instruments include, inter alia, the Paris Convention for the Protection of Industrial Property, as last revised in 1967; the Berne Convention for the Protection of Literary and Artistic Works, as last revised in 1979; the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention); the WIPO Copyright Treaty; the WIPO Performances and Phonograms Treaty (which, inter alia, provides international protection for performers of "expressions of folklore"), the Convention on Biological Diversity; the Universal Copyright Convention, as last revised in 1971; and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) of WTO.

<sup>2</sup> See article 17 of the Universal Declaration of Human Rights; article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination; article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); article 21 of the American Convention on Human Rights; and article 4 of the African Charter on Human and Peoples' Rights (Banjul Charter).

<sup>3</sup> See article 19 of the Universal Declaration of Human Rights; article 19, paragraph 2, of the International Covenant on Civil and Political Rights; article 5 of the European Convention on Human Rights; article 13 of the American Declaration on Human Rights and article 9 of the African Charter on Human and Peoples' Rights.

<sup>4</sup> See article 26, paragraph 2, of the Universal Declaration of Human Rights. See also article 13, paragraph 1, of the Covenant.

<sup>5</sup> See article 5 (e) (vi) of the Convention on the Elimination of All Forms of Racial Discrimination; article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and article 17, paragraph 2, of the African Charter on Human and Peoples' Rights.

<sup>6</sup> See article 27 of the International Covenant on Civil and Political Rights; article 13 (c) of the Convention on the Elimination of all Forms of Discrimination against Women; article 31 of the Convention on the Rights of the Child and article 31 of the International Convention on the Rights of All Migrant Workers and Members of their Families.

<sup>7</sup> See also paragraph 32 below.

<sup>8</sup> See Maria Green, International Anti-Poverty Law Centre, “Drafting history of article 15 (1) (c) of the International Covenant on Economic, Social and Cultural Rights”, E/C.12/2000/15, paragraph 45.

<sup>9</sup> Committee on Economic, Social and Cultural Rights, twenty-seventh session (2001), “Human Rights and Intellectual Property”, Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at paragraph 6.

<sup>10</sup> See also paragraph 32 below.

<sup>11</sup> See article 5, paragraph 2 of the Covenant.

<sup>12</sup> See below, at paragraphs 22, 23 and 35. See also articles 4 and 5 of the Covenant.

<sup>13</sup> Commission on Human Rights, second session, Report of the Working Group on the Declaration on Human Rights, E/CN.4/57, 10 December 1947, page 15.

<sup>14</sup> See article 6 bis of the Berne Convention for the Protection of Literary and Artistic Works.

<sup>15</sup> This prohibition, to some extent, duplicates the national treatment provisions contained in international conventions for the protection of intellectual property, the main difference being that articles 2, paragraph 2 and 3 of the Covenant apply not only to foreigners but also to a State party’s own nationals (see articles 6 to 15 of the Covenant: “everyone”). See also Committee on Economic, Social and Cultural Rights, thirty-fourth session, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights, 13 May 2005.

<sup>16</sup> See paragraph 35 below. The need to strike an adequate balance between article 15, paragraph 1 (c), and other rights under the Covenant applies, in particular, to the rights to take part in cultural life (art. 15, para. 1 (a)) and to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)), as well as the rights to food (art. 11), health (art. 12) and education (art. 13).

<sup>17</sup> See article 17, paragraph 2, of the Universal Declaration of Human Rights; article 21, paragraph 2, of the American Convention on Human Rights and article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>18</sup> See general comment No. 3 (1990), at paragraph 9; general comment No. 13 (1999) on the right to education, at paragraph 43 and general comment No. 14 (2000) on the right to the highest attainable standard of health, at paragraph 30. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles), at paragraphs 16 and 22, Maastricht, 2-6 June 1986.

<sup>19</sup> See general comment No. 3 (1990), paragraph 9; general comment No. 13 (1999), paragraph 44; general comment No. 14 (2000), paragraph 31. See also Limburg Principles, paragraph 21.

<sup>20</sup> See general comment No. 3 (1990), at paragraph 9; general comment No. 13 (1999), at paragraph 45 and general comment No. 14 (2000), at paragraph 32.

<sup>21</sup> See general comment No. 13 (1999), at paragraphs 46 and 47, and general comment No. 14 (2000), at paragraph 33. See also Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines), paragraph 6, Maastricht, 22-26 January 1997.

<sup>22</sup> See article 15, paragraph 1 (c), of the Covenant, read in conjunction with article 27 of the International Covenant on Civil and Political Rights. See also UNESCO, General Conference, nineteenth session, Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It, adopted on 26 November 1976, at paragraph I (2) (f).

<sup>23</sup> See Committee on Economic, Social and Cultural Rights, nineteenth session, general comment No. 9 (1998) on the domestic application of the Covenant, at paragraph 9. See also article 8 of the Universal Declaration of Human Rights and article 2, paragraph 3, of the International Covenant on Civil and Political Rights.

<sup>24</sup> See also article 22, paragraph 1, of the International Covenant on Civil and Political Rights.

<sup>25</sup> See Committee on Economic, Social and Cultural Rights, twenty-seventh session (2001), "Human Rights and Intellectual Property", Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at paragraph 9.

<sup>26</sup> *Ibid.*, at paragraph 17.

<sup>27</sup> *Ibid.*, at paragraph 12.

<sup>28</sup> *Ibid.*, at paragraph 4.

<sup>29</sup> Cf. article 27, paragraph 2, of the WTO TRIPS Agreement.

<sup>30</sup> See article 4 of the UNESCO Universal Declaration on the Human Genome and Human Rights, although this instrument is not as such legally binding.

<sup>31</sup> Committee on Economic, Social and Cultural Rights, fifth session, general comment No. 3 (1990), at paragraph 14.

<sup>32</sup> Committee on Economic, Social and Cultural Rights, twenty-seventh session, Human Rights and Intellectual Property, Statement by the Committee on Economic, Social and Cultural Rights, 29 November 2001, E/C.12/2001/15, at paragraph 15.

<sup>33</sup> See article 8 (j) of the Convention on Biological Diversity. See also Sub-Commission on the Promotion and Protection of Human Rights, 26th meeting, Resolution 2001/21, E/CN.4/Sub.2/Res/2001/21.

<sup>34</sup> Cf. Universal Declaration of Human Rights, article 8; general comment No. 9 (1998), at paragraphs 3 and 9; Limburg Principles, at paragraph 19; Maastricht Guidelines, at paragraph 22.

<sup>35</sup> See general comment No. 9 (1998), at paragraph 9 (with regard to administrative remedies). See further article 14 (1) of the International Covenant on Civil and Political Rights.

<sup>36</sup> See general comment No. 9, at paragraph 9.

<sup>37</sup> Cf. Committee on Economic, Social and Cultural Rights, eighteenth session, Globalization and Economic, Social and Cultural Rights, Statement by the Committee on Economic, Social and Cultural Rights, 11 May 1998, at paragraph 5.

### **Thirty-fifth session (2005)**

#### **General comment No. 18: The right to work (art. 6)**

##### **I. INTRODUCTION AND BASIC PREMISES**

1. The right to work is a fundamental right, recognized in several international legal instruments. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as laid down in article 6, deals more comprehensively than any other instrument with this right. The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.<sup>1</sup>

2. The ICESCR proclaims the right to work in a general sense in its article 6 and explicitly develops the individual dimension of the right to work through the recognition in article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions. The collective dimension of the right to work is addressed in article 8, which enunciates the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely. When drafting article 6 of the Covenant, the Commission on Human Rights affirmed the need to recognize the right to work in a broad sense by laying down specific legal obligations rather than a simple philosophical principle.<sup>2</sup> Article 6 defines the right to work in a general and non-exhaustive manner. In article 6, paragraph 1, States parties recognize “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”. In paragraph 2, States parties recognize that “to achieve the full realization of this right” the steps to be taken “shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment, under conditions safeguarding fundamental political and economic freedoms to the individual”.

3. These objectives reflect the fundamental purposes and principles of the United Nations as defined in article 1, paragraph 3, of the Charter of the United Nations. The essence of these objectives is also reflected in article 23, paragraph 1, of the Universal Declaration of Human Rights. Since the adoption of the Covenant by the General Assembly in 1966, several universal and regional human rights instruments have recognized the right to work. At the universal level, the right to work is contained in article 8, paragraph 3 (a), of the International Covenant on Civil and Political Rights (ICCPR); in article 5, paragraph (e) (i), of the International Convention on the Elimination of All Forms of Racial Discrimination; in article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women; in article 32 of the Convention on the Rights of the Child; and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Several regional instruments recognize the right to work in its general dimension, including the European Social Charter of 1961 and the Revised European Social Charter of 1996 (Part II, art. 1), the African Charter on Human and Peoples' Rights (art. 15) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 6), and affirm the principle that respect for the right to work imposes on States parties an obligation to take measures aimed at the realization of full employment. Similarly, the right to work has been proclaimed by the United Nations General Assembly in the Declaration on Social Progress and Development, in its resolution 2542 (XXIV) of 11 December 1969 (art. 6).

4. The right to work, as guaranteed in the ICESCR, affirms the obligation of States parties to assure individuals their right to freely chosen or accepted work, including the right not to be deprived of work unfairly. This definition underlines the fact that respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work, while emphasizing the importance of work for personal development as well as for social and economic inclusion. International Labour Organization Convention No. 122 concerning Employment Policy (1964) speaks of "full, productive and freely chosen employment", linking the obligation of States parties to create the conditions for full employment with the obligation to ensure the absence of forced labour. Nevertheless, for millions of human beings throughout the world, full enjoyment of the right to freely chosen or accepted work remains a remote prospect. The Committee recognizes the existence of structural and other obstacles arising from international factors beyond the control of States which hinder the full enjoyment of article 6 in many States parties.

5. With the aim of helping States parties to implement the Covenant and discharge their reporting obligations, this general comment deals with the normative content of article 6 (chap. II), the obligations of States parties (chap. III), violations (chap. IV), and implementation at the national level (chap. V), while the obligations of actors other than States parties are covered in chapter VI. The general comment is based on the experience gained by the Committee over many years in its consideration of reports of States parties.

## **II. NORMATIVE CONTENT OF THE RIGHT TO WORK**

6. The right to work is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment. Article 6, paragraph 1, contains a definition of the right to work and

paragraph 2 cites, by way of illustration and in a non-exhaustive manner, examples of obligations incumbent upon States parties. It includes the right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.

7. Work as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families as highlighted in article 7 of the Covenant. These fundamental rights also include respect for the physical and mental integrity of the worker in the exercise of his/her employment.

8. Articles 6, 7 and 8 of the Covenant are interdependent. The characterization of work as decent presupposes that it respects the fundamental rights of the worker. Although articles 7 and 8 are closely linked to article 6, they will be dealt with in separate general comments. Reference to articles 7 and 8 will therefore only be made whenever the indivisibility of these rights so requires.

9. The International Labour Organization defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>3</sup> The Committee reaffirms the need for States parties to abolish, forbid and counter all forms of forced labour as enunciated in article 4 of the Universal Declaration of Human Rights, article 5 of the Slavery Convention and article 8 of the ICCPR.

10. High unemployment and the lack of secure employment are causes that induce workers to seek employment in the informal sector of the economy. States parties must take the requisite measures, legislative or otherwise, to reduce to the fullest extent possible the number of workers outside the formal economy, workers who as a result of that situation have no protection. These measures would compel employers to respect labour legislation and declare their employees, thus enabling the latter to enjoy all the rights of workers, in particular those provided for in articles 6, 7 and 8 of the Covenant. These measures must reflect the fact that people living in an informal economy do so for the most part because of the need to survive, rather than as a matter of choice. Moreover, domestic and agricultural work must be properly regulated by national legislation so that domestic and agricultural workers enjoy the same level of protection as other workers.

11. ILO Convention No. 158 concerning Termination of Employment (1982) defines the lawfulness of dismissal in its article 4 and in particular imposes the requirement to provide valid grounds for dismissal as well as the right to legal and other redress in the case of unjustified dismissal.

12. The exercise of work in all its forms and at all levels requires the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each State party:



(a) *Availability*. States parties must have specialized services to assist and support individuals in order to enable them to identify and find available employment;

(b) *Accessibility*. The labour market must be open to everyone under the jurisdiction of States parties.<sup>4</sup> Accessibility comprises three dimensions:

- (i) Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality. According to article 2 of ILO Convention No. 111, States parties should “declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”. Many measures, such as most strategies and programmes designed to eliminate employment-related discrimination, as emphasized in paragraph 18 of general comment No. 14 (2000) on the right to the highest attainable standard of health, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls that, even in times of severe resource constraints, disadvantaged and marginalized individuals and groups must be protected by the adoption of relatively low-cost targeted programmes;<sup>5</sup>
- (ii) Physical accessibility is one dimension of accessibility to employment as explained in paragraph 22 of general comment No. 5 on persons with disabilities;
- (iii) Accessibility includes the right to seek, obtain and impart information on the means of gaining access to employment through the establishment of data networks on the employment market at the local, regional, national and international levels;

(c) *Acceptability and quality*. Protection of the right to work has several components, notably the right of the worker to just and favourable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work.

### **Special topics of broad application**

#### *Women and the right to work*

13. Article 3 of the Covenant prescribes that States parties undertake to “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights”. The Committee

underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value.<sup>6</sup> In particular, pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment. Lastly, emphasis should be placed on the link between the fact that women often have less access to education than men and certain traditional cultures which compromise the opportunities for the employment and advancement of women.

*Young persons and the right to work*

14. Access to a first job constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty. Young persons, particularly young women, generally have great difficulties in finding initial employment. National policies relating to adequate education and vocational training should be adopted and implemented to promote and support access to employment opportunities for young persons, in particular young women.

*Child labour and the right to work*

15. The protection of children is covered by article 10 of the Covenant. The Committee recalls its general comment No. 14 (2000) and in particular paragraphs 22 and 23 on children's right to health, and emphasizes the need to protect children from all forms of work that are likely to interfere with their development or physical or mental health. The Committee reaffirms the need to protect children from economic exploitation, to enable them to pursue their full development and acquire technical and vocational education as indicated in article 6, paragraph 2. The Committee also recalls its general comment No. 13 (1999), in particular the definition of technical and vocational education (paras. 15 and 16) as a component of general education. Several international human rights instruments adopted after the ICESCR, such as the Convention on the Rights of the Child, expressly recognize the need to protect children and young people against any form of economic exploitation or forced labour.<sup>7</sup>

*Older persons and the right to work*

16. The Committee recalls its general comment No. 6 (1995) on the economic, social and cultural rights of older persons and in particular the need to take measures to prevent discrimination on grounds of age in employment and occupation.<sup>8</sup>

*Persons with disabilities and the right to work*

17. The Committee recalls the principle of non-discrimination in access to employment by persons with disabilities enunciated in its general comment No. 5 (1994) on persons with disabilities. "The 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' is not realized where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under substandard conditions."<sup>9</sup> States parties must take measures enabling persons with disabilities to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society.<sup>10</sup>

*Migrant workers and the right to work*

18. The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.

### III. STATES PARTIES' OBLIGATIONS

#### General legal obligations

19. The principal obligation of States parties is to ensure the progressive realization of the exercise of the right to work. States parties must therefore adopt, as quickly as possible, measures aiming at achieving full employment. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.<sup>11</sup> States parties have immediate obligations in relation to the right to work, such as the obligation to “guarantee” that it will be exercised “without discrimination of any kind” (art. 2, para. 2) and the obligation “to take steps” (art. 2, para. 1) towards the full realization of article 6.<sup>12</sup> Such steps must be deliberate, concrete and targeted towards the full realization of the right to work.

20. The fact that realization of the right to work is progressive and takes place over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content.<sup>13</sup> It means that States parties have a specific and continuing obligation “to move as expeditiously and effectively as possible” towards the full realization of article 6.

21. As with all other rights in the Covenant, retrogressive measures should in principle not be taken in relation to the right to work. If any deliberately retrogressive steps are taken, States parties have the burden of proving that they have been introduced after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the States parties' maximum available resources.<sup>14</sup>

22. Like all human rights, the right to work imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. The obligation to *respect* the right to work requires States parties to refrain from interfering directly or indirectly with the enjoyment of that right. The obligation to *protect* requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to work. The obligation to *fulfil* includes the obligations to provide, facilitate and promote that right. It implies that States parties should adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure its full realization.

#### Specific legal obligations

23. States parties are under the obligation to *respect* the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work

for all persons, especially disadvantaged and marginalized individuals and groups, including prisoners or detainees,<sup>15</sup> members of minorities and migrant workers. In particular, States parties are bound by the obligation to respect the right of women and young persons to have access to decent work and thus to take measures to combat discrimination and to promote equal access and opportunities.

24. With regard to the obligations of States parties relating to child labour as set out in article 10 of the Covenant, States parties must take effective measures, in particular legislative measures, to prohibit labour of children under the age of 16. Further, they have to prohibit all forms of economic exploitation and forced labour of children.<sup>16</sup> States parties must adopt effective measures to ensure that the prohibition of child labour will be fully respected.<sup>17</sup>

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

26. States parties are obliged to *fulfil (provide)* the right to work when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. This obligation includes, inter alia, the obligation to recognize the right to work in national legal systems and to adopt a national policy on the right to work as well as a detailed plan for its realization. The right to work requires formulation and implementation by States parties of an employment policy with a view to "stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment".<sup>18</sup> It is in this context that effective measures to increase the resources allocated to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized, should be taken by States parties. The Committee emphasizes the need to establish a compensation mechanism in the event of loss of employment, as well as the obligation to take appropriate measures for the establishment of employment services (public or private) at the national and local levels.<sup>19</sup> Further, the obligation to fulfil (provide) the right to work includes the implementation by States parties of plans to counter unemployment.<sup>20</sup>

27. The obligation to *fulfil (facilitate)* the right to work requires States parties, inter alia, to take positive measures to enable and assist individuals to enjoy the right to work and to implement technical and vocational education plans to facilitate access to employment.

28. The obligation to *fulfil (promote)* the right to work requires States parties to undertake, for example, educational and informational programmes to instil public awareness on the right to work.

### **International obligations**

29. In its general comment No. 3 (1990) the Committee draws attention to the obligation of all States parties to take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the

Covenant. In the spirit of Article 56 of the Charter of the United Nations and specific provisions of the Covenant (arts. 2.1, 6, 22 and 23), States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to work. States parties should, through international agreements where appropriate, ensure that the right to work as set forth in articles 6, 7 and 8 of the Covenant is given due attention.

30. To comply with their international obligations in relation to article 6, States parties should endeavour to promote the right to work in other countries as well as in bilateral and multilateral negotiations. In negotiations with international financial institutions, States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups.

### **Core obligations**

31. In general comment No. 3 (1990) the Committee confirms that States parties have a core obligation to ensure the satisfaction of minimum essential levels of each of the rights covered by the Covenant. In the context of article 6, this “core obligation” encompasses the obligation to ensure non-discrimination and equal protection of employment. Discrimination in the field of employment comprises a broad cluster of violations affecting all stages of life, from basic education to retirement, and can have a considerable impact on the work situation of individuals and groups. Accordingly, these core obligations include at least the following requirements:

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
- (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
- (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers’ and workers’ organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed.

## **IV. VIOLATIONS**

32. A distinction should be drawn between the inability and the unwillingness of States parties to comply with their obligations under article 6. This follows from article 6, paragraph 1, which guarantees the right of everyone to the opportunity to gain his living by work that he freely

chooses or accepts, and article 2, paragraph 1, which places an obligation on each State party to undertake the necessary measures “to the maximum of its available resources”. The obligations of States parties must be interpreted in the light of these two articles. States parties that are unwilling to use the maximum of their available resources for the realization of the right to work are in violation of their obligations under article 6. Nevertheless, resource constraints may explain the difficulties a State party may encounter in fully guaranteeing the right to work, to the extent that the State party demonstrates that it has used all available resources at its disposal in order to fulfil, as a matter of priority, the obligations outlined above. Violations of the right to work can occur through the direct action of States or State entities, or through the lack of adequate measures to promote employment. Violations through *acts of omission* occur, for example, when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Violations through *acts of commission* include forced labour; the 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.

### **Violations of the obligation to respect**

33. Violations of the obligation to respect the right to work include laws, policies and actions that contravene the standards laid down in article 6 of the Covenant. In particular, any discrimination in access to the labour market or to means and entitlements for obtaining employment on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or any other situation with the aim of impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant. The principle of non-discrimination mentioned in article 2, paragraph 2, of the Covenant is immediately applicable and is neither subject to progressive implementation nor dependent on available resources. It is directly applicable to all aspects of the right to work. The failure of States parties to take into account their legal obligations regarding the right to work when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities constitutes a violation of their obligation to respect the right to work.

34. As for all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to work are not permissible. Such retrogressive measures include, inter alia, denial of access to employment to particular individuals or groups, whether such discrimination is based on legislation or practice, abrogation or suspension of the legislation necessary for the exercise of the right to work or the adoption of laws or policies that are manifestly incompatible with international legal obligations relating to the right to work. An example would be the institution of forced labour or the abrogation of legislation protecting the employee against unlawful dismissal. Such measures would constitute a violation of States parties’ obligation to respect the right to work.

### **Violations of the obligation to protect**

35. Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right

to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal.

### **Violations of the obligation to fulfil**

36. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to work. Examples include the failure to adopt or implement a national employment policy designed to ensure the right to work for everyone; insufficient expenditure or misallocation of public funds which results in the non-enjoyment of the right to work by individuals or groups, particularly the disadvantaged and marginalized; the failure to monitor the realization of the right to work at the national level, for example, by identifying right-to-work indicators and benchmarks; and the failure to implement technical and vocational training programmes.

## **V. IMPLEMENTATION AT THE NATIONAL LEVEL**

37. In accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize “all appropriate means, including particularly the adoption of legislative measures” for the implementation of their Covenant obligations. Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone is protected from unemployment and insecurity in employment and can enjoy the right to work as soon as possible.

### **Legislation, strategies and policies**

38. States parties should consider the adoption of specific legislative measures for the implementation of the right to work. Those measures should (a) establish national mechanisms to monitor implementation of employment strategies and national plans of action and (b) contain provisions on numerical targets and a time frame for implementation. They should also provide (c) means of ensuring compliance with the benchmarks established at the national level and (d) the involvement of civil society, including experts on labour issues, the private sector and international organizations. In monitoring progress on realization of the right to work, States parties should identify the factors and difficulties affecting the fulfilment of their obligations.

39. Collective bargaining is a tool of fundamental importance in the formulation of employment policies.

40. United Nations agencies and programmes should, upon States parties’ request, assist in drafting and reviewing relevant legislation. The ILO, for example, has considerable expertise and accumulated knowledge concerning legislation in the field of employment.

41. States parties should adopt a national strategy, based on human rights principles aimed at progressively ensuring full employment for all. Such a national strategy also imposes a requirement to identify the resources available to States parties for achieving their objectives as well as the most cost-effective ways of using them.

42. The formulation and implementation of a national employment strategy should involve full respect for the principles of accountability, transparency, and participation by interested groups. The right of individuals and groups to participate in decision-making should be an integral part of all policies, programmes and strategies intended to implement the obligations of States parties under article 6. The promotion of employment also requires effective involvement of the community and, more specifically, of associations for the protection and promotion of the rights of workers and trade unions in the definition of priorities, decision-making, planning, implementation and evaluation of the strategy to promote employment.

43. To create conditions favourable to the enjoyment of the right to work, States parties must also take appropriate measures to ensure that both the private and public sectors reflect an awareness of the right to work in their activities.

44. The national employment strategy must take particular account of the need to eliminate discrimination in access to employment. It must ensure equal access to economic resources and to technical and vocational training, particularly for women, disadvantaged and marginalized individuals and groups, and should respect and protect self-employment as well as employment with remuneration that enables workers and their families to enjoy an adequate standard of living as stipulated in article 7 (a) (ii) of the Covenant.<sup>21</sup>

45. States parties should develop and maintain mechanisms to monitor progress towards the realization of the right to freely chosen or accepted employment, to identify the factors and difficulties affecting the degree of compliance with their obligations and to facilitate the adoption of corrective legislative and administrative measures, including measures to implement their obligations under articles 2.1 and 23 of the Covenant.

### **Indicators and benchmarks**

46. A national employment strategy must define indicators on the right to work. The indicators should be designed to monitor effectively, at the national level, the compliance by States parties with their obligations under article 6 and should be based on ILO indicators such as the rate of unemployment, underemployment and the ratio of formal to informal work. Indicators developed by the ILO that apply to the preparation of labour statistics may be useful in the preparation of a national employment plan.<sup>22</sup>

47. Having identified appropriate right to work indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of “scoping” with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. During the following five years the State party will use these national benchmarks to help monitor its implementation of the right to work. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved and the reasons for any difficulties that may have been encountered. Further, when setting benchmarks and preparing their reports States parties should utilize the extensive information and advisory services of specialized agencies with regard to data collection and disaggregation.



### **Remedies and accountability**

48. Any person or group who is a victim of a violation of the right to work should have access to effective judicial or other appropriate remedies at the national level. At the national level trade unions and human rights commissions should play an important role in defending the right to work. All victims of such violations are entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or a guarantee of non-repetition.

49. Incorporation of international instruments setting forth the right to work into the domestic legal order, in particular the relevant ILO conventions, should strengthen the effectiveness of measures taken to guarantee the right to work and is encouraged. The incorporation of international instruments recognizing the right to work into the domestic legal order, or the recognition of their direct applicability, significantly enhances the scope and effectiveness of remedial measures and is encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to work by directly applying obligations under the Covenant.

50. Judges and other law enforcement authorities are invited to pay greater attention to violations of the right to work in the exercise of their functions.

51. States parties should respect and protect the work of human rights defenders and other members of civil society, in particular the trade unions, who assist disadvantaged and marginalized individuals and groups in the realization of their right to work.

## **VI. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES**

52. While only States are parties to the Covenant and are thus ultimately accountable for compliance with it, all members of society - individuals, local communities, trade unions, civil society and private sector organizations - have responsibilities regarding the realization of the right to work. States parties should provide an environment facilitating the discharge of these obligations. Private enterprises - national and multinational - while not bound by the Covenant, have a particular role to play in job creation, hiring policies and non-discriminatory access to work. They should conduct their activities on the basis of legislation, administrative measures, codes of conduct and other appropriate measures promoting respect for the right to work, agreed between the government and civil society. Such measures should recognize the labour standards elaborated by the ILO and aim at increasing the awareness and responsibility of enterprises in the realization of the right to work.

53. The role of the United Nations agencies and programmes, and in particular the key function of the ILO in protecting and implementing the right to work at the international, regional and national levels, is of particular importance. Regional institutions and instruments, where they exist, also play an important role in ensuring the right to work. When formulating and implementing their national employment strategies, States parties should avail themselves of the technical assistance and cooperation offered by the ILO. When preparing their reports, States parties should also use the extensive information and advisory services provided by the ILO for data collection and disaggregation as well as the development of indicators and benchmarks. In conformity with articles 22 and 23 of the Covenant, the ILO and the other specialized agencies of the United Nations, the World Bank, regional development banks, the International Monetary

Fund, the World Trade Organization and other relevant bodies within the United Nations system should cooperate effectively with States parties to implement the right to work at the national level, bearing in mind their own mandates. International financial institutions should pay greater attention to the protection of the right to work in their lending policies and credit agreements. In accordance with paragraph 9 of general comment No. 2 (1990), particular efforts should be made to ensure that the right to work is protected in all structural adjustment programmes. When examining the reports of States parties and their ability to meet their obligations under article 6, the Committee will consider the effects of the assistance provided by actors other than States parties.

54. Trade unions play a fundamental role in ensuring respect for the right to work at the local and national levels and in assisting States parties to comply with their obligations under article 6. The role of trade unions is fundamental and will continue to be considered by the Committee in its consideration of the reports of States parties.

### Notes

<sup>1</sup> See the preamble to ILO Convention No. 168, 1988: "... the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them."

<sup>2</sup> Commission on Human Rights, eleventh session, agenda item 31, A/3525 (1957).

<sup>3</sup> ILO Convention No. 29 concerning Forced or Compulsory Labour, 1930, article 2, paragraph 1; see also paragraph 2. ILO Convention No. 105 concerning the Abolition of Forced Labour, 1957.

<sup>4</sup> Only some of these topics feature in articles 2.2 and 3 of the Covenant. The others have been inferred from the practice of the Committee or from legislation or judicial practice in a growing number of States parties.

<sup>5</sup> See general comment No. 3 (1990), The nature of States parties' obligations, paragraph 12.

<sup>6</sup> See general comment No. 16 (2005) on article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights, paragraphs 23-25.

<sup>7</sup> See the Convention on the Rights of the Child, 1989, article 32, paragraph 1, reflected in the second preambular paragraph of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. See also article 3, paragraph 1, of the Protocol, on forced labour.

<sup>8</sup> See general comment No. 6 (1995) on the economic, social and cultural rights of older persons, paragraph 22 (and paragraph 24 on retirement).

<sup>9</sup> See general comment No. 5 (1994) on persons with disabilities, including other references in paragraphs 20-24.

<sup>10</sup> See ILO Convention No. 159 concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983. See article 1, paragraph 2, on access to employment. See also the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, proclaimed by the General Assembly in its resolution 48/96 of 20 December 1993.

<sup>11</sup> See general comment No. 3 (1990) on the nature of States parties' obligations, paragraph 1.

<sup>12</sup> Ibid, para. 2.

<sup>13</sup> Ibid, para. 9.

<sup>14</sup> Ibid, para. 9.

<sup>15</sup> If offered on a voluntary basis. On the question of the work of prisoners, see also the Standard Minimum Rules for the Treatment of Prisoners and article 2 of the ILO Convention (No. 29) concerning Forced or Compulsory Labour.

<sup>16</sup> See Convention on the Rights of the Child, article 31, paragraph 1.

<sup>17</sup> See ILO Convention on the Worst Forms of Child Labour, article 2, paragraph 7, and the Committee's general comment No. 13 on the right to education.

<sup>18</sup> See ILO Convention No. 122 concerning Employment Policy, 1964, article 1, paragraph 1.

<sup>19</sup> See ILO Convention No. 88 concerning the Organization of the Employment Service, 1948.

<sup>20</sup> See ILO Convention No. 88 and, similarly, ILO Convention No. 2 concerning Unemployment, 1919. See also ILO Convention No. 168 concerning Employment Promotion and Protection against Unemployment, 1988.

<sup>21</sup> See general comment No. 12 (1999) on the right to adequate food, paragraph 26.

<sup>22</sup> See ILO Convention No. 160 concerning Labour Statistics, in particular, its articles 1 and 2.

### **Thirty-ninth session (2007)**

#### **General comment No. 19:<sup>1</sup> The right to social security (art. 9)**

##### **I. INTRODUCTION**

1. Article 9 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) provides that, 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.

2. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.

3. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.

4. In accordance with article 2 (1), States parties to the Covenant must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security, including social insurance. The wording of article 9 of the Covenant indicates that the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right. These measures can include:

(a) Contributory or insurance-based schemes such as social insurance, which is expressly mentioned in article 9. These generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund;

(b) Non-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are received by those in a situation of need). In almost all States parties, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance-based system.

5. Other forms of social security are also acceptable, including (a) privately run schemes, and (b) self-help or other measures, such as community-based or mutual schemes. Whichever system is chosen, it must conform to the essential elements of the right to social security and to that extent should be viewed as contributing to the right to social security and be protected by States parties in accordance with this general comment.

6. The right to social security has been strongly affirmed in international law. The human rights dimensions of social security were clearly present in the Declaration of Philadelphia of 1944 which called for the “extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care”.<sup>2</sup> Social security was recognized as a human right in the Universal Declaration of Human Rights of 1948, which states in article 22 that “Everyone, as a member of society, has the right to social security” and in article 25(1) that everyone has the “right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”. The right was subsequently incorporated in a range of international human rights treaties<sup>3</sup> and regional human rights treaties.<sup>4</sup> In 2001, the International Labour Conference, composed of representatives of States, employers, and workers, affirmed that social security “is a basic human right and a fundamental means for creating social cohesion”.<sup>5</sup>

7. The Committee on Economic, Social and Cultural Rights (the Committee) is concerned over the very low levels of access to social security with a large majority (about 80 per cent) of the global population currently lacking access to formal social security. Among these 80 per cent, 20 per cent live in extreme poverty.<sup>6</sup>

8. During its monitoring of the implementation of the Covenant, the Committee has consistently expressed its concern over the denial of or lack of access to adequate social security, which has undermined the realization of many Covenant rights. The Committee has also consistently addressed the right to social security, not only during its consideration of the reports of States parties but also in its general comments and various statements.<sup>7</sup> With a view to assisting the implementation by States parties of the Covenant and the fulfilment of their reporting obligations, this general comment focuses on the normative content of the right to social security (chapter II), on States parties' obligations (chapter III), on violations (chapter IV) and on implementation at the national level (chapter V), while the obligations of actors other than States parties are addressed in chapter VI.

## **II. NORMATIVE CONTENT OF THE RIGHT TO SOCIAL SECURITY**

9. The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.

### **A. Elements of the right to social security**

10. While the elements of the right to social security may vary according to different conditions, a number of essential factors apply in all circumstances as set out below. In interpreting these aspects, it should be borne in mind that social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy.

#### **1. Availability - social security system**

11. The right to social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. The system should be established under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system. The schemes should also be sustainable, including those concerning provision of pensions, in order to ensure that the right can be realized for present and future generations.

#### **2. Social risks and contingencies**

12. The social security system should provide for the coverage of the following nine principal branches of social security.<sup>8</sup>

##### **(a) Health care**

13. States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all.<sup>9</sup> In cases in which the health system foresees private or

mixed plans, such plans should be affordable, in conformity with the essential elements enunciated in the present general comment.<sup>10</sup> The Committee notes the particular importance of the right to social security in the context of endemic diseases such as HIV/AIDS, tuberculosis and malaria, and the need to provide access to preventive and curative measures.

**(b) Sickness**

14. Cash benefits should be provided to those incapable of working due to ill-health to cover periods of loss of earnings. Persons suffering from long periods of sickness should qualify for disability benefits.

**(c) Old age**

15. States parties should take appropriate measures to establish social security schemes that provide benefits to older persons, starting at a specific age, to be prescribed by national law.<sup>11</sup> The Committee stresses that States parties should establish a retirement age that is appropriate to national circumstances which take account of, inter alia, the nature of the occupation, in particular work in hazardous occupations and the working ability of older persons. States parties should, within the limits of available resources, provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income.

**(d) Unemployment**

16. In addition to promoting full, productive and freely chosen employment, States parties must endeavour to provide benefits to cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment. In the case of loss of employment, benefits should be paid for an adequate period of time and at the expiry of the period, the social security system should ensure adequate protection of the unemployed worker, for example through social assistance. The social security system should also cover other workers, including part-time workers, casual workers, seasonal workers, and the self-employed, and those working in atypical forms of work in the informal economy.<sup>12</sup> Benefits should be provided to cover periods of loss of earnings by persons who are requested not to report for work during a public health or other emergency.

**(e) Employment injury**

17. States parties should also ensure the protection of workers who are injured in the course of employment or other productive work. The social security system should cover the costs and loss of earnings from the injury or morbid condition and the loss of support for spouses or dependents suffered as the result of the death of a breadwinner.<sup>13</sup> Adequate benefits should be provided in the form of access to health care and cash benefits to ensure income security. Entitlement to benefits should not be made subject to the length of employment, to the duration of insurance or to the payment of contributions.

**(f) Family and child support**

18. Benefits for families are crucial for realizing the rights of children and adult dependents to protection under articles 9 and 10 of the Covenant. In providing the benefits, the State party should take into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child or adult dependent, as well as any other consideration relevant to an application for benefits made by or on behalf of the child or adult dependent.<sup>14</sup> Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.

**(g) Maternity**

19. Article 10 of the Covenant expressly provides that “working mothers should be accorded paid leave or leave with adequate social security benefits”.<sup>15</sup> Paid maternity leave should be granted to all women, including those involved in atypical work, and benefits should be provided for an adequate period.<sup>16</sup> Appropriate medical benefits should be provided for women and children, including perinatal, childbirth and postnatal care and care in hospital where necessary.

**(h) Disability**

20. In its general comment No. 5 ((1994) on persons with disabilities, the Committee emphasized the importance of providing adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost, or received a reduction in, their income, have been denied employment opportunities or have a permanent disability. Such support should be provided in a dignified manner<sup>17</sup> and reflect the special needs for assistance and other expenses often associated with disability. The support provided should cover family members and other informal carers.

**(i) Survivors and orphans**

21. States parties must also ensure the provision of benefits to survivors and orphans on the death of a breadwinner who was covered by social security or had rights to a pension.<sup>18</sup> Benefits should cover funeral costs, particularly in those States parties where funeral expenses are prohibitive. Survivors or orphans must not be excluded from social security schemes on the basis of prohibited grounds of discrimination and they should be given assistance in accessing social security schemes, particularly when endemic diseases, such as HIV/AIDS, tuberculosis and malaria, leave large numbers of children or older persons without family and community support.

### **3. Adequacy**

22. Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12 of the Covenant. States parties must also pay full respect to the principle of human dignity contained in

the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. Methods applied should ensure the adequacy of benefits. The adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.

#### **4. Accessibility**

##### **(a) Coverage**

23. All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant. In order to ensure universal coverage, non-contributory schemes will be necessary.

##### **(b) Eligibility**

24. Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.<sup>19</sup>

##### **(c) Affordability**

25. If a social security scheme requires contributions, those contributions should be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights.

##### **(d) Participation and information**

26. Beneficiaries of social security schemes must be able to participate in the administration of the social security system.<sup>20</sup> The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.

##### **(e) Physical access**

27. Benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant. Particular attention should be paid in this regard to persons with disabilities, migrants, and persons living in remote or disaster-prone areas, as well as areas experiencing armed conflict, so that they, too, can have access to these services.

#### **5. Relationship with other rights**

28. The right to social security plays an important role in supporting the realization of many of the rights in the Covenant, but other measures are necessary to complement the right to social



security. For example, States parties should provide social services for rehabilitation of the injured and persons with disabilities in accordance with article 6 of the Covenant, provide child care and welfare, advice and assistance with family planning and the provision of special facilities for persons with disabilities and older persons (article 10); take measures to combat poverty and social exclusion and provide supporting social services (article 11); and adopt measures to prevent disease and improve health facilities, goods and services (article 12).<sup>21</sup> States parties should also consider schemes that provide social protection to individuals belonging to disadvantaged and marginalized groups, for example crop or natural disaster insurance for small farmers<sup>22</sup> or livelihood protection for self-employed persons in the informal economy. However, the adoption of measures to realize other rights in the Covenant will not in itself act as a substitute for the creation of social security schemes.

## **B. Special topics of broad application**

### **1. Non-discrimination and equality**

29. The obligation of States parties to guarantee that the right to social security is enjoyed without discrimination (article 2, paragraph 2, of the Covenant), and equally between men and women (article 3), pervades all of the obligations under Part III of the Covenant. The Covenant thus prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex,<sup>23</sup> age,<sup>24</sup> language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability,<sup>25</sup> health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.

30. States parties should also remove de facto discrimination on prohibited grounds, where individuals are unable to access adequate social security. States parties should ensure that legislation, policies, programmes and the allocation of resources facilitate access to social security for all members of society in accordance with Part III. Restrictions on access to social security schemes should also be reviewed to ensure that they do not discriminate in law or in fact.

31. Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers,<sup>26</sup> minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.

### **2. Gender equality**

32. In general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), the Committee noted that implementation of article 3 in relation to article 9 requires, inter alia, equalization of the compulsory retirement age for both men and women; ensuring that women receive equal benefits in both public and private pension schemes; and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.<sup>27</sup> In social security schemes that link benefits

with contributions, States parties should take steps to eliminate the factors that prevent women from making equal contributions to such schemes (for example, intermittent participation in the workforce on account of family responsibilities and unequal wage outcomes) or ensure that schemes take account of such factors in the design of benefit formulas (for example by considering child rearing periods or periods to take care of adult dependents in relation to pension entitlements). Differences in the average life expectancy of men and women can also lead directly or indirectly to discrimination in provision of benefits (particularly in the case of pensions) and thus need to be taken into account in the design of schemes. Non-contributory schemes must also take account of the fact that women are more likely to live in poverty than men and often have sole responsibility for the care of children.

### **3. Workers inadequately protected by social security (part-time, casual, self-employed and homeworkers)**

33. Steps must be taken by States parties to the maximum of their available resources to ensure that the social security systems cover workers inadequately protected by social security, including part-time workers, casual workers, the self-employed and homeworkers. Where social security schemes for such workers are based on occupational activity, they should be adapted so that they enjoy conditions equivalent to those of comparable full-time workers. Except in the case of employment injury, these conditions could be determined in proportion to hours of work, contributions or earnings, or through other appropriate methods. Where such occupation-based schemes do not provide adequate coverage to these workers, a State party will need to adopt complementary measures.

### **4. Informal economy**

34. States parties must take steps to the maximum of their available resources to ensure that the social security systems cover those persons working in the informal economy. The informal economy has been defined by the International Labour Conference as “all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements.”<sup>28</sup> This duty is particularly important where social security systems are based on a formal employment relationship, business unit or registered residence. Measures could include: (a) removing obstacles that prevent such persons from accessing informal social security schemes, such as community-based insurance; (b) ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; and (c) respecting and supporting social security schemes developed within the informal economy such as micro-insurance and other microcredit related schemes. The Committee notes that in a number of States parties with a large informal economy, programmes such as universal pension and health-care schemes that cover all persons have been adopted.

### **5. Indigenous Peoples and Minority Groups**

35. States parties should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.

## **6. Non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons)**

36. Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.<sup>29</sup> A migrant worker's entitlement should also not be affected by a change in workplace.

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

38. Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.<sup>30</sup>

## **7. Internally displaced persons and internal migrants**

39. Internally displaced persons should not suffer from any discrimination in the enjoyment of their right to social security and States parties should take proactive measures to ensure equal access to schemes, for example by waiving, where applicable, residence requirements and making allowance for provision of benefits or other related services at the place of displacement. Internal migrants should be able to access social security from their place of residence, and residence registration systems should not restrict access to social security for individuals who move to another district where they are not registered.

# **III. OBLIGATIONS OF STATES PARTIES**

## **A. General legal obligations**

40. While the Covenant provides for progressive realization and acknowledges the constraints owing to the limits of available resources, the Covenant also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (article 2, paragraph 2), ensuring the equal rights of men and women (article 3), and the obligation to take steps (article 2, paragraph 1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to social security.

41. The Committee acknowledges that the realization of the right to social security carries significant financial implications for States parties, but notes that the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should

allocate adequate fiscal and other resources at the national level. If necessary, they should avail themselves of international cooperation and technical assistance in line with article 2, paragraph 1, of the Covenant.

42. There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.

## **B. Specific legal obligations**

43. The right to social security, like any human right, imposes three types of obligations on States parties: the obligation to respect, the obligation to protect and the obligation to fulfil.

### **1. Obligation to respect**

44. The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from 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 institutions that have been established by individuals or corporate bodies to provide social security.

### **2. Obligation to protect**

45. The obligation to protect requires that State parties prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities, as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions; arbitrarily or unreasonably interfering with self-help or customary or traditional arrangements for social security that are consistent with the right to social security; and failing to pay legally required contributions for employees or other beneficiaries into the social security system.

46. Where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national

social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security. To prevent such abuses an effective regulatory system must be established which includes framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance.

### **3. Obligation to fulfil**

47. The obligation to fulfil requires States parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security. The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.

48. The obligation to facilitate requires States parties to take positive measures to assist individuals and communities to enjoy the right to social security. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right;<sup>31</sup> ensuring that the social security system will be adequate, accessible for everyone and will cover social risks and contingencies.<sup>32</sup>

49. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education and public awareness concerning access to social security schemes, particularly in rural and deprived urban areas, or amongst linguistic and other minorities.

50. States parties are also obliged to provide the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realize that right themselves, within the existing social security system with the means at their disposal. States parties will need to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection. Special attention should be given to ensuring that the social security system can respond in times of emergency, for example during and after natural disasters, armed conflict and crop failure.

51. It is important that social security schemes cover disadvantaged and marginalized groups, even where there is limited capacity to finance social security, either from tax revenues and/or contributions from beneficiaries. Low-cost and alternative schemes could be developed to cover immediately those without access to social security, although the aim should be to integrate them into regular social security schemes. Policies and a legislative framework could be adopted for the progressive inclusion of those in the informal economy or who are otherwise excluded from access to social security.

### **4. International obligations**

52. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the rights inscribed in the Covenant, including the right to social security.

53. To comply with their international obligations in relation to the right to social security, States parties have to respect the enjoyment of the right by refraining from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries.

54. States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries. Where States parties can take steps to influence third parties (non-State actors) within their jurisdiction to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

55. Depending on the availability of resources, States parties should facilitate the realization of the right to social security in other countries, for example through provision of economic and technical assistance. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. Economically developed States parties have a special responsibility for and interest in assisting the developing countries in this regard.

56. States parties should ensure that the right to social security is given due attention in international agreements and, to that end, should consider the development of further legal instruments. The Committee notes the importance of establishing reciprocal bilateral and multilateral international agreements or other instruments for coordinating or harmonizing contributory social security schemes for migrant workers.<sup>33</sup> Persons temporarily working in another country should be covered by the social security scheme of their home country.

57. With regard to the conclusion and implementation of international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to social security. Agreements concerning trade liberalization should not restrict the capacity of a State Party to ensure the full realization of the right to social security.

58. States parties should ensure that their actions as members of international organizations take due account of the right to social security. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures. States parties should ensure that the policies and practices of international and regional financial institutions, in particular those concerning their role in structural adjustment and in the design and implementation of social security systems, promote and do not interfere with the right to social security.

## **5. Core obligations**

59. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant.<sup>34</sup> This requires the State party:

(a) To ensure 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,<sup>35</sup> basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies;

(b) To ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups;<sup>36</sup>

(c) To respect existing social security schemes and protect them from unreasonable interference;<sup>37</sup>

(d) To adopt and implement a national social security strategy and plan of action;<sup>38</sup>

(e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;<sup>39</sup>

(f) To monitor the extent of the realization of the right to social security.<sup>40</sup>

60. 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 disposal in an effort to satisfy, as a matter of priority, these minimum obligations.<sup>41</sup>

61. The Committee also wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical, to enable developing countries to fulfil their core obligations.

#### IV. VIOLATIONS

62. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken the necessary steps towards the realization of the right to social security within their maximum available resources, and have guaranteed that the right is enjoyed without discrimination and equally by men and women (articles 2 and 3 of the Covenant). Under international law, a failure to act in good faith to take such steps amounts to a violation of the Covenant.<sup>42</sup>

63. In assessing whether States parties have complied with obligations to take action, the Committee looks at whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles and whether it is subject to an adequate framework of monitoring and accountability.

64. Violations of the right to social security can occur through acts of commission, i.e. the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of deliberately retrogressive measures incompatible with the core obligations outlined in paragraph 42 above; the 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.

65. Violations through acts of omission can occur when the State party fails to take sufficient and appropriate action to realize the right to social security. In the context of social security, examples of such violations include the failure to take appropriate steps towards the full realization of everyone's right to social security; the failure to enforce relevant laws or put into effect policies designed to implement the right to social security; the failure to ensure the financial sustainability of State pension schemes; the failure to reform or repeal legislation which is manifestly inconsistent with the right to social security; the failure to regulate the activities of individuals or groups so as to prevent them from violating the right to social security; the failure to remove promptly obstacles which the State party is under a duty to remove in order to permit the immediate fulfilment of a right guaranteed by the Covenant; the failure to meet the core obligations (see paragraph 59 above); the failure of a State party to take into account its Covenant obligations when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

## **V. IMPLEMENTATION AT THE NATIONAL LEVEL**

66. In the implementation of their Covenant obligations, and in accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures." Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances.<sup>43</sup> The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible.

### **A. Legislation, strategies and policies**

67. States parties are obliged to adopt all appropriate measures such as legislation, strategies, policies and programmes to ensure that the specific obligations with regard to the right to social security will be implemented. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to social security, and should be repealed, amended or changed if inconsistent with Covenant requirements. Social security systems should also regularly be monitored to ensure their sustainability.

68. The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy and plan of action to realize the right to social security, unless the State party can clearly show that it has a comprehensive social security system in place and that it reviews it regularly to ensure that it is consistent with the right to social security. The strategy and action plan should be reasonably conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right to social security; set targets or goals to be achieved and the time-frame for their achievement, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources. When formulating and implementing national



strategies on the right to social security, States parties should avail themselves, if necessary, of the technical assistance and cooperation of the United Nations specialized agencies (see Part VI below).

69. The formulation and implementation of national social security strategies and plans of action should respect, *inter alia*, the principles of non-discrimination, gender equality and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security should be an integral part of any policy, programme or strategy concerning social security.

70. The national social security strategy and plan of action and its implementation should also be based on the principles of accountability and transparency. The independence of the judiciary and good governance are also essential to the effective implementation of all human rights.

71. In order to create a favourable climate for the realization of the right to social security, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider its importance in pursuing their activities.

72. States parties may find it advantageous to adopt framework legislation to implement the right to social security. Such legislation might include: (a) targets or goals to be attained and the time frame for their achievement; (b) the means by which the purpose could be achieved; (c) the intended collaboration with civil society, the private sector and international organizations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedures.

### **B. Decentralization and the right to social security**

73. Where responsibility for the implementation of the right to social security has been delegated to regional or local authorities or is under the constitutional authority of a federal body, the State party retains the obligation to comply with the Covenant, and therefore should ensure that these regional or local authorities effectively monitor the necessary social security services and facilities, as well as the effective implementation of the system. The States parties must further ensure that such authorities do not deny access to benefits and services on a discriminatory basis, whether directly or indirectly.

### **C. Monitoring, indicators and benchmarks**

74. States parties are obliged to monitor effectively the realization of the right to social security and should establish the necessary mechanisms or institutions for such a purpose. In monitoring progress towards the realization of the right to social security, States parties should identify the factors and difficulties affecting implementation of their obligations.

75. To assist the monitoring process, right to social security indicators should be identified in national strategies or plans of action in order that the State party's obligations under article 9 can be monitored at the national and international levels. Indicators should address the different elements of social security (such as adequacy, coverage of social risks and contingencies, affordability and accessibility), be disaggregated on the prohibited grounds of discrimination, and cover all persons residing in the territorial jurisdiction of the State party or under its control.

States parties may obtain guidance on appropriate indicators from the ongoing work of the International Labour Organization (ILO), World Health Organization (WHO) and International Social Security Association (ISSA).

76. Having identified appropriate indicators for the right to social security, States parties are invited to set appropriate national benchmarks. During the periodic reporting procedure, the Committee will engage in a process of “scoping” with States parties. Scoping involves the joint consideration by States parties and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the States parties will use these national benchmarks to help monitor their implementation of the right to social security. Thereafter, in the subsequent reporting process, States parties and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.<sup>44</sup> When setting benchmarks and preparing their reports, States parties should utilize the extensive information and advisory services of the United Nations specialized agencies and programmes.

#### **D. Remedies and accountability**

77. Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national and international levels.<sup>45</sup> All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations of the right. Legal assistance for obtaining remedies should be provided within maximum available resources.

78. Before any action is carried out by the State party, or by any other third party, that interferes with the right of an individual to social security the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and include: (a) an opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies. Where such action is based on the ability of a person to contribute to a social security scheme, their capacity to pay must be taken into account. Under no circumstances should an individual be deprived of a benefit on discriminatory grounds or of the minimum essential level of benefits as defined in paragraph 59 (a).

79. The incorporation in the domestic legal order of international instruments recognizing the right to social security can significantly enhance the scope and effectiveness of remedial measures and should be encouraged. Incorporation enables courts to adjudicate violations of the right to social security by direct reference to the Covenant.

80. Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to social security in the exercise of their functions.

81. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society, with a view to assisting disadvantaged and marginalized individuals and groups in the realization of their right to social security.

## **VI. OBLIGATIONS OF ACTORS OTHER THAN STATES**

82. The United Nations specialized agencies and other international organizations concerned with social security, such as ILO, WHO, the United Nations Food and Agriculture Organization, the United Nations Children's Fund, the United Nations Human Settlements Programme, the United Nations Development Programme and ISSA, as well as international organizations concerned with trade such as the World Trade Organization, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to social security.

83. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to social security in their lending policies, credit agreements, structural adjustment programmes and similar projects,<sup>46</sup> so that the enjoyment of the right to social security, particularly by disadvantaged and marginalized individuals and groups, is promoted and not compromised.

84. When examining the reports of States parties and their ability to meet the obligations to realize the right to social security, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and principles in the programmes and policies of international organizations will greatly facilitate the implementation of the right to social security.

### **Notes**

<sup>1</sup> Adopted on 23 November 2007.

<sup>2</sup> Declaration concerning the aims and purposes of the International Labour Organization (ILO), annex to the Constitution of the ILO, section III (f).

<sup>3</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 5 (e) (iv); Convention on the Elimination of All Forms of Discrimination against Women, articles 11, para. 1 (e) and 14, para. 2 (c); and Convention on the Rights of the Child, article 26.

<sup>4</sup> For explicit mention of the right to social security, see American Declaration of the Rights and Duties of Man, article XVI; Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador), article 9; European Social Charter (and 1996 revised version), articles 12, 13 and 14.

<sup>5</sup> International Labour Conference, 89th session, report of the Committee on Social Security, resolutions and conclusions concerning social security.

<sup>6</sup> Michael Cichon and Krzysztof Hagemeyer, “Social Security for All: Investing in Global and Economic Development. A Consultation”, *Issues in Social Protection Series, Discussion Paper 16*, ILO Social Security Department, Geneva, 2006.

<sup>7</sup> See general comments No. 5 (1994) on persons with disabilities; No. 6 (1995) on the economic, social and cultural rights of older persons; No. 12 (1999) on the right to adequate food (art. 11); No. 14 (2000) on the right to the highest attainable standard of health (art. 12); No. 15 (2002) on the right to water (arts. 11 and 12); No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3); and No. 18 (2005) on the right to work (art. 6). See also Statement by the Committee: An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the Covenant (E/C.12/2007/1).

<sup>8</sup> See in particular ILO Convention No. 102 (1952) on Social Security (Minimum Standards), which was confirmed by the ILO Governing Body in 2002 as an instrument corresponding to contemporary needs and circumstances. These categories were also affirmed by States and trade union and employer representatives in the ILO Maritime Labour Convention (2006), regulation 4.5, standard A4.5. The Committee’s revised general guidelines for State reporting of 1991 follow this approach. See also Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts. 11, 12 and 13.

<sup>9</sup> General comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12). Coverage must include any morbid condition, whatever its cause, and pregnancy and confinement and their consequences, general and practical medical care, together with hospitalization.

<sup>10</sup> See above, para. 4 and see below paras. 23-27.

<sup>11</sup> See general comment No. 6 (1995) on the economic, social and cultural rights of older persons.

<sup>12</sup> As defined in paras. 29-39 below.

<sup>13</sup> See ILO Convention No. 121 (1964) on Employment Injury Benefits.

<sup>14</sup> See Convention on the Rights of the Child, article 26.

<sup>15</sup> The Committee notes that ILO Convention No. 183 (2000) on Maternity Protection provides that maternity leave should be for a period of not less than 14 weeks, including a period of six weeks’ compulsory leave after childbirth.

<sup>16</sup> See CEDAW, article 11, para. 2 (b).

<sup>17</sup> Institutionalization of persons with disabilities, unless rendered necessary for other reasons, cannot be regarded as an adequate substitute for the social security and income-support

rights of such persons, as well as rehabilitation and employment support, in order to assist persons with disabilities to secure work as required by articles 6 and 7 of the Covenant.

<sup>18</sup> The Committee also notes that children have a right to social security. See Convention on the Rights of the Child, article 26.

<sup>19</sup> The Committee notes that, under ILO Convention No. 168 (1988) on Employment Promotion and Protection against Unemployment, such action can only be taken in certain circumstances: absence from the territory of the State; a competent authority has determined that the person concerned deliberately contributed to their own dismissal or left employment voluntarily without just cause; during the period a person stops work due to a labour dispute; the person has attempted to obtain or has obtained benefits fraudulently; the person has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable work; or the person is in receipt of another income maintenance benefit provided for in the legislation of the relevant State, except a family benefit, provided that the part of the benefit which is suspended does not exceed that other benefit.

<sup>20</sup> Articles 71 and 72 of ILO Convention 102 (1952) on Social Security (Minimum Standards) set out similar requirements.

<sup>21</sup> See [Social Security principles](#), *Social Security Series No. 1*, ILO (1998), p. 14 and general comments No. 5 (1994) on persons with disabilities, No. 6 (1995) on the economic, social and cultural rights of older persons; No. 12 (1999) on the right to adequate food (art. 11); No. 13 (1999) on the right to education (art. 13); No. 14 (2000) on the right to the highest attainable standard of health (art. 12); No. 15 (2002) on the right to water (arts. 11 and 12); and No. 18 (2005) on the right to work (art. 6).

<sup>22</sup> [Social Security principles](#), *Social Security Series No. 1*, ILO, p. 29.

<sup>23</sup> See general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

<sup>24</sup> See general comment No. 6. The Committee notes that some distinctions can be made on the basis of age, for example entitlement to a pension. The key underlying principle is that any distinction on prohibited grounds must be reasonable and justified in the circumstances.

<sup>25</sup> See general comment No. 5.

<sup>26</sup> Homeworkers are those who work from home for remuneration for an employer or similar business enterprise or activity. See ILO Convention No. 177 (1996) on Home Work.

<sup>27</sup> Article 10 of the Covenant expressly provides that “working mothers should be accorded paid leave or leave with adequate social security benefits”.

<sup>28</sup> Conclusions concerning decent work and the informal economy, General Conference of the International Labour Organization, 90th session, para. 3.

<sup>29</sup> See report of the Secretary-General on international migration and development (A/60/871), para. 98.

<sup>30</sup> See Convention relating to the Status of Refugees, articles 23 and 24 and Convention relating to the Status of Stateless Persons, articles 23 and 24.

<sup>31</sup> See paras. 59 (d) and 68-70 below.

<sup>32</sup> See paras. 12-21 above.

<sup>33</sup> See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 27.

<sup>34</sup> See general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1 of the Covenant).

<sup>35</sup> Read in conjunction with general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), paras. 43 and 44, this would include access to health facilities, goods and services on a non-discriminatory basis, provision of essential drugs, access to reproductive, maternal (prenatal as well as post-natal) and child health care, and immunization against the major infectious diseases occurring in the community.

<sup>36</sup> See paras. 29-31 above.

<sup>37</sup> See paras. 44-46 above.

<sup>38</sup> See paras. 68-70 below.

<sup>39</sup> See for example paras. 31-39 above.

<sup>40</sup> See para. 74 below.

<sup>41</sup> See general comment No. 3. paragraph 10.

<sup>42</sup> See Vienna Convention on the Law of Treaties, article 26.

<sup>43</sup> See statement by the Committee: An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (E/C.12/2007/1).

<sup>44</sup> See general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12), para. 58.

<sup>45</sup> See general comment No. 9 (1998) on the domestic application of the Covenant, paragraph 4.

<sup>46</sup> See general comment No. 2 (1990) on international technical assistance measures (art. 22 of the Covenant).



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**GENERAL COMMENT No. 20**

**Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the  
International Covenant on Economic, Social and Cultural Rights)**

**I. INTRODUCTION AND BASIC PREMISES**

1. Discrimination undermines the fulfilment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination.
2. Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights. Article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights (the Covenant) obliges each State party "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".
3. The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the "equal and inalienable rights of all" and the Covenant expressly recognizes the rights of "everyone" to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.

4. The Covenant also explicitly mentions the principles of non-discrimination and equality with respect to some individual rights. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and article 7 includes the “right to equal remuneration for work of equal value” and “equal opportunity for everyone to be promoted” in employment. Article 10 stipulates that, *inter alia*, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognizes that “primary education shall be compulsory and available free to all” and provides that “higher education shall be made equally accessible to all”.

5. The preamble, Articles 1, paragraph 3, and 55, of the Charter of the United Nations and article 2, paragraph 1, of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. International treaties on racial discrimination, discrimination against women and the rights of refugees, stateless persons, children, migrant workers and members of their families, and persons with disabilities include the exercise of economic, social and cultural rights,<sup>1</sup> while other treaties require the elimination of discrimination in specific fields, such as employment and education.<sup>2</sup> In addition to the common provision on equality and non-discrimination in both the Covenant and the International Covenant on Civil and Political Rights, article 26 of the International Covenant on Civil and Political Rights contains an independent guarantee of equal and effective protection before and of the law.<sup>3</sup>

6. In previous general comments, the Committee on Economic, Social and Cultural Rights has considered the application of the principle of non-discrimination to specific Covenant rights relating to housing, food, education, health, water, authors’ rights, work and social security.<sup>4</sup>

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<sup>1</sup> See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention relating to the Status of Refugees; the Convention relating to the Status of Stateless Persons; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Convention on the Rights of Persons with Disabilities.

<sup>2</sup> ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (1958); and the UNESCO Convention against Discrimination in Education.

<sup>3</sup> See general comment No. 18 (1989) of the Human Rights Committee on non-discrimination.

<sup>4</sup> The Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 4 (1991): The right to adequate housing; general comment No. 7 (1997): The right to adequate housing: forced evictions (art. 11, para. 1); general comment No. 12 (1999): The right to adequate food; general comment No. 13 (1999): The right to education (art. 13); general comment No. 14 (2000): The right to the highest attainable standard of health (art. 12); general comment No. 15 (2002): The right to water (arts. 11 and 12); general comment No. 17 (2005):



Moreover, general comment No. 16 focuses on State parties' obligations under article 3 of the Covenant to ensure equal rights of men and women to the enjoyment of all Covenant rights, while general comments Nos. 5 and 6 respectively concern the rights of persons with disabilities and older persons.<sup>5</sup> The present general comment aims to clarify the Committee's understanding of the provisions of article 2, paragraph 2, of the Covenant, including the scope of State obligations (Part II), the prohibited grounds of discrimination (Part III), and national implementation (Part IV).

## II. SCOPE OF STATE OBLIGATIONS

7. Non-discrimination is an immediate and cross-cutting obligation in the Covenant. Article 2, paragraph 2, requires States parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with these rights. It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.<sup>6</sup> Discrimination also includes incitement to discriminate and harassment.

8. In order for States parties to "guarantee" that the Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:<sup>7</sup>

(a) **Formal discrimination:** Eliminating formal discrimination requires ensuring that a State's constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status;

(b) **Substantive discrimination:** Merely addressing formal discrimination will not ensure substantive equality as envisaged and defined by article 2, paragraph 2.<sup>8</sup> The effective

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The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (art. 15, para. 1 (c)); general comment No. 18 (2005): The right to work (art. 6); and general comment No. 19 (2008): The right to social security.

<sup>5</sup> CESCR, general comment No. 5 (1994): Persons with disabilities; and general comment No. 6 (1995): The economic, social and cultural rights of older persons.

<sup>6</sup> For a similar definition see art. 1, ICERD; art. 1, CEDAW; and art. 2 of the Convention on the Rights of Persons with Disabilities (CRPD). The Human Rights Committee comes to a similar interpretation in its general comment No. 18, paragraphs 6 and 7. The Committee has adopted a similar position in previous general comments.

<sup>7</sup> CESCR, general comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

<sup>8</sup> See also CESCR general comment No. 16.

enjoyment of Covenant rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas.

9. In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.

10. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

### **Private sphere**

11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.

### **Systemic discrimination**

12. The Committee has regularly found that discrimination against some groups is pervasive and persistent and deeply entrenched in social behaviour and organization, often involving unchallenged or indirect discrimination. Such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups.

### **Permissible scope of differential treatment**

13. Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

14. Under international law, a failure to act in good faith to comply with the obligation in article 2, paragraph 2, to guarantee that the rights enunciated in the Covenant will be exercised without discrimination amounts to a violation. Covenant rights can be violated through the direct action or omission by States parties, including through their institutions or agencies at the national and local levels. States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

## **III. PROHIBITED GROUNDS OF DISCRIMINATION**

15. Article 2, paragraph 2, lists the prohibited grounds of discrimination as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The inclusion of "other status" indicates that this list is not exhaustive and other grounds may be incorporated in this category. The express grounds and a number of implied grounds under "other status" are discussed below. The examples of differential treatment presented in this section are merely illustrative and they are not intended to represent the full scope of possible discriminatory treatment under the relevant prohibited ground, nor a conclusive finding that such differential treatment will amount to discrimination in every situation.

### **Membership of a group**

16. In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) or perception by others that an individual is part of such a group (e.g. a person has a similar skin colour or is a supporter of the rights of a particular group or a past member of a group).

### **Multiple discrimination<sup>9</sup>**

17. Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.

#### **A. Express grounds**

18. The Committee has consistently raised concern over formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities among others.

#### **“Race and colour”**

19. Discrimination on the basis of “race and colour”, which includes an individual’s ethnic origin, is prohibited by the Covenant as well as by other treaties including the International Convention on the Elimination of Racial Discrimination. The use of the term “race” in the Covenant or the present general comment does not imply the acceptance of theories which attempt to determine the existence of separate human races.<sup>10</sup>

#### **Sex**

20. The Covenant guarantees the equal right of men and women to the enjoyment of economic, social and cultural rights.<sup>11</sup> Since the adoption of the Covenant, the notion of the prohibited ground “sex” has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

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<sup>9</sup> See para. 27 of the present general comment on intersectional discrimination.

<sup>10</sup> See the outcome document of the Durban Review Conference, para. 6: “*Reaffirms* that all peoples and individuals constitute one human family, rich in diversity, and that all human beings are born free and equal in dignity and rights; and strongly rejects any doctrine of racial superiority along with theories which attempt to determine the existence of so-called distinct human races.”

<sup>11</sup> See art. 3 of the Covenant, and CESCR general comment No. 16.

**Language**

21. Discrimination on the basis of language or regional accent is often closely linked to unequal treatment on the basis of national or ethnic origin. Language barriers can hinder the enjoyment of many Covenant rights, including the right to participate in cultural life as guaranteed by article 15 of the Covenant. Therefore, information about public services and goods, for example, should also be available, as far as possible, in languages spoken by minorities, and States parties should ensure that any language requirements relating to employment and education are based on reasonable and objective criteria.

**Religion**

22. This prohibited ground of discrimination covers the profession of religion or belief of one's choice (including the non-profession of any religion or belief), that may be publicly or privately manifested in worship, observance, practice and teaching.<sup>12</sup> For instance, discrimination arises when persons belonging to a religious minority are denied equal access to universities, employment, or health services on the basis of their religion.

**Political or other opinion**

23. Political and other opinions are often grounds for discriminatory treatment and include both the holding and not-holding of opinions, as well as expression of views or membership within opinion-based associations, trade unions or political parties. Access to food assistance schemes, for example, must not be made conditional on an expression of allegiance to a particular political party.

**National or social origin**

24. "National origin" refers to a person's State, nation, or place of origin. Due to such personal circumstances, individuals and groups of individuals may face systemic discrimination in both the public and private sphere in the exercise of their Covenant rights. "Social origin" refers to a person's inherited social status, which is discussed more fully below in the context of "property" status, descent-based discrimination under "birth" and "economic and social status".<sup>13</sup>

**Property**

25. Property status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and income), or the lack of it. The Committee has previously commented that

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<sup>12</sup> See also the General Assembly's Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly in its resolution 36/55 of 25 November 1981.

<sup>13</sup> See paras. 25, 26 and 35, of the present general comment.

Covenant rights, such as access to water services and protection from forced eviction, should not be made conditional on a person's land tenure status, such as living in an informal settlement.<sup>14</sup>

### **Birth**

26. Discrimination based on birth is prohibited and article 10, paragraph 3, of the Covenant specifically states, for example, that special measures should be taken on behalf of children and young persons "without any discrimination for reasons of parentage". Distinctions must therefore not be made against those who are born out of wedlock, born of stateless parents or are adopted or constitute the families of such persons. The prohibited ground of birth also includes descent, especially on the basis of caste and analogous systems of inherited status.<sup>15</sup> States parties should take steps, for instance, to prevent, prohibit and eliminate discriminatory practices directed against members of descent-based communities and act against the dissemination of ideas of superiority and inferiority on the basis of descent.

### **B. Other status<sup>16</sup>**

27. The nature of discrimination varies according to context and evolves over time. A flexible approach to the ground of "other status" is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2. These additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization. The Committee's general comments and concluding observations have recognized various other grounds and these are described in more detail below. However, this list is not intended to be exhaustive. Other possible prohibited grounds could include the denial of a person's legal capacity because he or she is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.

### **Disability**

28. In its general comment No. 5, the Committee defined discrimination against persons with disabilities<sup>17</sup> as "any distinction, exclusion, restriction or preference, or denial of reasonable

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<sup>14</sup> See CESCR general comments Nos. 15 and 4 respectively.

<sup>15</sup> For a comprehensive overview of State obligations in this regard, see general comment No. 29 (2002) of the Committee on the Elimination of All Forms of Racial Discrimination on art. 1, para. 1, regarding descent.

<sup>16</sup> See para. 15 of the present general comment.

<sup>17</sup> For a definition, see CRPD, art. 1: "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights”.<sup>18</sup> The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability.<sup>19</sup> States parties should address discrimination, such as prohibitions on the right to education, and denial of reasonable accommodation in public places such as public health facilities and the workplace,<sup>20</sup> as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.

### **Age**

29. Age is a prohibited ground of discrimination in several contexts. The Committee has highlighted the need to address discrimination against unemployed older persons in finding work, or accessing professional training or retraining, and against older persons living in poverty with unequal access to universal old-age pensions due to their place of residence.<sup>21</sup> In relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.

### **Nationality**

30. The ground of nationality should not bar access to Covenant rights,<sup>22</sup> e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.<sup>23</sup>

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<sup>18</sup> See CESCR general comment No. 5, para. 15.

<sup>19</sup> See CRPD, art. 2: “‘Reasonable accommodation’ means 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.”

<sup>20</sup> See CESCR general comment No. 5, para. 22.

<sup>21</sup> See, further, CESCR general comment No. 6.

<sup>22</sup> This paragraph is without prejudice to the application of art. 2, para. 3, of the Covenant, which states: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

<sup>23</sup> See also general comment No. 30 (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens.

### **Marital and family status**

31. Marital and family status may differ between individuals because, inter alia, they are married or unmarried, married under a particular legal regime, in a de facto relationship or one not recognized by law, divorced or widowed, live in an extended family or kinship group or have differing kinds of responsibility for children and dependants or a particular number of children. Differential treatment in access to social security benefits on the basis of whether an individual is married must be justified on reasonable and objective criteria. In certain cases, discrimination can also occur when an individual is unable to exercise a right protected by the Covenant because of his or her family status or can only do so with spousal consent or a relative's concurrence or guarantee.

### **Sexual orientation and gender identity**

32. "Other status" as recognized in article 2, paragraph 2, includes sexual orientation.<sup>24</sup> States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.<sup>25</sup>

### **Health status**

33. Health status refers to a person's physical or mental health.<sup>26</sup> States parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. The protection of public health is often cited by States as a basis for restricting human rights in the context of a person's health status. However, many such restrictions are discriminatory, for example, when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum.<sup>27</sup> States parties should also adopt measures to address widespread stigmatization of persons on the basis of their health status, such as mental illness, diseases such as leprosy and women who have suffered obstetric fistula, which often undermines the ability of individuals to

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<sup>24</sup> See CESCR general comments Nos. 14 and 15.

<sup>25</sup> For definitions, see the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

<sup>26</sup> See CESCR general comment No. 14, paras. 12(b), 18, 28 and 29.

<sup>27</sup> See the guidelines published by the Office of the High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2006), "International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version". Available online at: [http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines\\_en.pdf](http://data.unaids.org/Publications/IRC-pub07/JC1252-InternGuidelines_en.pdf).



enjoy fully their Covenant rights. Denial of access to health insurance on the basis of health status will amount to discrimination if no reasonable or objective criteria can justify such differentiation.

### **Place of residence**

34. The exercise of Covenant rights should not be conditional on, or determined by, a person's current or former place of residence; e.g. whether an individual lives or is registered in an urban or a rural area, in a formal or an informal settlement, is internally displaced or leads a nomadic lifestyle. Disparities between localities and regions should be eliminated in practice by ensuring, for example, that there is even distribution in the availability and quality of primary, secondary and palliative health-care facilities.

### **Economic and social situation**

35. Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

## **IV. NATIONAL IMPLEMENTATION**

36. In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated. Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures. States parties should regularly assess whether the measures chosen are effective in practice.

### **Legislation**

37. Adoption of legislation to address discrimination is indispensable in complying with article 2, paragraph 2. States parties are therefore encouraged to adopt specific legislation that prohibits discrimination in the field of economic, social and cultural rights. Such laws should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended in order to ensure that they do not discriminate or lead to discrimination, whether formally or substantively, in relation to the exercise and enjoyment of Covenant rights.

### **Policies, plans and strategies**

38. States parties should ensure that strategies, policies, and plans of action are in place and implemented in order to address both formal and substantive discrimination by public and

private actors in the area of Covenant rights. Such policies, plans and strategies should address all groups distinguished by the prohibited grounds and States parties are encouraged, among other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality. Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination. Public and private institutions should be required to develop plans of action to address non-discrimination and the State should conduct human rights education and training programmes for public officials and make such training available to judges and candidates for judicial appointments. Teaching on the principles of equality and non-discrimination should be integrated in formal and non-formal inclusive and multicultural education, with a view to dismantling notions of superiority or inferiority based on prohibited grounds and to promote dialogue and tolerance between different groups in society. States parties should also adopt appropriate preventive measures to avoid the emergence of new marginalized groups.

### **Elimination of systemic discrimination**

39. States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. States parties should consider using incentives to encourage public and private actors to change their attitudes and behaviour in relation to individuals and groups of individuals facing systemic discrimination, or penalize them in case of non-compliance. Public leadership and programmes to raise awareness about systemic discrimination and the adoption of strict measures against incitement to discrimination are often necessary. Eliminating systemic discrimination will frequently require devoting greater resources to traditionally neglected groups. Given the persistent hostility towards some groups, particular attention will need to be given to ensuring that laws and policies are implemented by officials and others in practice.

### **Remedies and accountability**

40. National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination. These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors. Where the facts and events at issue lie wholly, or in part, within the exclusive knowledge of the authorities or other respondent, the burden of proof should be regarded as resting on the authorities, or the other respondent, respectively. These institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation, guarantees of non-repetition and public apologies, and State parties should ensure that these measures are effectively implemented.

Domestic legal guarantees of equality and non-discrimination should be interpreted by these institutions in ways which facilitate and promote the full protection of economic, social and cultural rights.<sup>28</sup>

### **Monitoring, indicators and benchmarks**

41. States parties are obliged to monitor effectively the implementation of measures to comply with article 2, paragraph 2, of the Covenant. Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination. National strategies, policies and plans should use appropriate indicators and benchmarks, disaggregated on the basis of the prohibited grounds of discrimination.<sup>29</sup>

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<sup>28</sup> See CESCR general comments Nos. 3 and 9. See also the practice of the Committee in its concluding observations on reports of States parties to the Covenant.

<sup>29</sup> See CESCR general comments Nos. 13, 14, 15, 17 and 19, and its new reporting guidelines (E/C.12/2008/2).



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#### Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)

#### I. Introduction and basic premises

1. Cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.

2. The right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15: the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1 (c)); and the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3). The right of everyone to take part in cultural life is also intrinsically linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values. The right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11).

3. The right of everyone to take part in cultural life is also recognized in article 27, paragraph 1, of the Universal Declaration of Human Rights, which states that “everyone has the right freely to participate in the cultural life of the community”. Other international instruments refer to the right to equal participation in cultural activities;<sup>1</sup> the right to participate in all aspects of social and cultural life;<sup>2</sup> the right to participate fully in cultural

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<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (e) (vi).

<sup>2</sup> Convention on the Elimination of All Forms of Discrimination against Women, art. 13 (c).

and artistic life;<sup>3</sup> the right of access to and participation in cultural life;<sup>4</sup> and the right to take part on an equal basis with others in cultural life.<sup>5</sup> Instruments on civil and political rights,<sup>6</sup> on the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public,<sup>7</sup> and to participate effectively in cultural life,<sup>8</sup> on the rights of indigenous peoples to their cultural institutions, ancestral lands, natural resources and traditional knowledge,<sup>9</sup> and on the right to development<sup>10</sup> also contain important provisions on this subject.

4. In the present general comment, the Committee addresses specifically the right of everyone under article 15 paragraph 1 (a), to take part in cultural life, in conjunction with paragraphs 2, 3 and 4, as they relate to culture, creative activity and the development of international contacts and cooperation in cultural fields, respectively. The right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author, as provided for in article 15, paragraph 1 (c), was the subject of general comment No. 17 (2005).

5. The Committee has gained long experience on this subject through its consideration of reports and dialogue with States parties. In addition, it has twice organized a day of general discussion, once in 1992 and again in 2008, with representatives of international organizations and civil society with a view to preparing the present general comment.

## II. Normative content of article 15, paragraph 1 (a)

6. The right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods).

7. The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality. This is especially important for all indigenous peoples, who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law, as well as the United Nations Declaration on the Rights of Indigenous Peoples.

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<sup>3</sup> Convention on the Rights of the Child, art. 31, para. 2.

<sup>4</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43, para. 1 (g).

<sup>5</sup> Convention on the Rights of Persons with Disabilities, art. 30, para. 1.

<sup>6</sup> In particular the International Covenant on Civil and Political Rights, arts. 17, 18, 19, 21 and 22.

<sup>7</sup> International Covenant on Civil and Political Rights, art. 27.

<sup>8</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 2, paras. 1 and 2. See also Framework Convention for the Protection of National Minorities (Council of Europe, ETS No. 157), art. 15.

<sup>9</sup> United Nations Declaration on the Rights of Indigenous Peoples, in particular arts. 5, 8, and 10–13 ff. See also ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in particular arts. 2, 5, 7, 8, and 13–15 ff.

<sup>10</sup> Declaration on the Right to Development (General Assembly resolution 41/128), art. 1. In its general comment No. 4, paragraph 9, the Committee considers that rights cannot be viewed in isolation from other human rights contained in the two international Covenants and other applicable international instruments.

## A. Components of article 15, paragraph 1 (a)

8. The content or scope of the terms used in article 15, paragraph 1 (a), on the right of everyone to take part in cultural life, is to be understood as set out below:

### “Everyone”

9. In its general comment No. 17 on the right to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which one is the author,<sup>11</sup> the Committee recognizes that the term “everyone” in the first line of article 15 may denote the individual or the collective; in other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.

### “Cultural life”

10. Various definitions of “culture” have been postulated in the past and others may arise in the future. All of them, however, refer to the multifaceted content implicit in the concept of culture.<sup>12</sup>

11. In the Committee’s view, culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future.

12. The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity. This concept takes account of the individuality and otherness of culture as the creation and product of society.

13. The Committee considers that culture, for the purpose of implementing article 15 (1) (a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food,

<sup>11</sup> See definition of “author” in general comment No. 17 (2005), paras. 7 and 8.

<sup>12</sup> Culture is (a) “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs” (UNESCO Universal Declaration on Cultural Diversity, fifth preambular paragraph); (b) “in its very essence, a social phenomenon resulting from individuals joining and cooperating in creative activities [and] is not limited to access to works of art and the human rights, but is at one and the same time the acquisition of knowledge, the demand for a way of life and need to communicate” (UNESCO recommendation on participation by the people at large in cultural life and their contribution to it, 1976, the Nairobi recommendation, fifth preambular paragraph (a) and (c)); (c) “covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and meanings that they give to their existence and to their development” (Fribourg Declaration on Cultural Rights, art. 2 (a) (definitions)); (d) “the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups [and] a system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life”. (Rodolfo Stavenhagen, “Cultural Rights: A social science perspective”, in H. Niec (ed.), *Cultural Rights and Wrongs: A collection of essays in commemoration of the 50th anniversary of the Universal Declaration of Human Rights*, Paris and Leicester, UNESCO Publishing and Institute of Art and Law).

clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.

#### **“To participate” or “to take part”**

14. The terms “to participate” and “to take part” have the same meaning and are used interchangeably in other international and regional instruments.

15. There are, among others, three interrelated main components of the right to participate or take part in cultural life: (a) participation in, (b) access to, and (c) contribution to cultural life.

(a) *Participation* covers in particular the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and to express oneself in the language of one’s choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity;

(b) *Access* covers in particular the right of everyone — alone, in association with others or as a community — to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water,<sup>13</sup> biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities;

(c) *Contribution to cultural life* refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person’s cultural rights.<sup>14</sup>

## **B. Elements of the right to take part in cultural life**

16. The following are necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination.

(a) *Availability* is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums, theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature’s gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as

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<sup>13</sup> General comment No. 15 (2002), paras. 6 and 11.

<sup>14</sup> UNESCO Universal Declaration on Cultural Diversity, art. 5. See also Fribourg Declaration on Cultural Rights, art. 7.

well as values, which make up identity and contribute to the cultural diversity of individuals and communities. Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;

(b) *Accessibility* consists of effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination.<sup>15</sup> It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.

(c) *Acceptability* entails that the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them;

(d) *Adaptability* refers to the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities;

(e) *Appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.<sup>16</sup> The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. The way in which rights are implemented may also have an impact on cultural life and cultural diversity. The Committee wishes to stress in this regard the need to take into account, as far as possible, cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed.

### C. Limitations to the right to take part in cultural life

17. The right of everyone to take part in cultural life is closely linked to the enjoyment of other rights recognized in the international human rights instruments. Consequently, States parties have a duty to implement their obligations under article 15, paragraph 1 (a), together with their obligations under other provisions of the Covenant and international instruments, in order to promote and protect the entire range of human rights guaranteed under international law.

18. The Committee wishes to recall that, while account must be taken of national and regional particularities and various historical, cultural and religious backgrounds, it is the duty of States, regardless of their political, economic or cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>17</sup> Thus, no one may invoke cultural

<sup>15</sup> See general comment No. 20 (2009).

<sup>16</sup> Fribourg Declaration on Cultural Rights, art. 1 (e).

<sup>17</sup> Vienna Declaration and Programme of Action, para. 5.



diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.<sup>18</sup>

19. Applying limitations to the right of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also wishes to stress the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association.

20. Article 15, paragraph 1 (a) may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for therein.<sup>19</sup>

## **D. Special topics of broad application**

### **Non-discrimination and equal treatment**

21. Article 2, paragraph 2, and article 3 of the Covenant prohibit any discrimination in the exercise of the right of everyone to take part in cultural life on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>20</sup>

22. In particular, no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services.

23. The Committee emphasizes that the elimination of all forms of discrimination in order to guarantee the exercise of the right of everyone to take part in cultural life can, in many cases, be achieved with limited resources<sup>21</sup> by the adoption, amendment or repeal of legislation, or through publicity and information. In particular, a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories. The Committee also refers States parties to its general comment No. 3 (1990), paragraph 12, on the nature of States parties' obligations, which establishes that, even in times of severe resource constraints, the most disadvantaged and marginalized individuals and groups can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

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<sup>18</sup> Universal Declaration on Cultural Diversity, art. 4.

<sup>19</sup> International Covenant on Economic, Social and Cultural Rights, art. 5, para. 1.

<sup>20</sup> See general comment No. 20 (2009).

<sup>21</sup> See general comment No. 3 (1990); statement by the Committee: an evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (E/C.12/2007/1).

24. The adoption of temporary special measures with the sole purpose of achieving de facto equality does not constitute discrimination, provided that such measures do not perpetuate unequal protection or form a separate system of protection for certain individuals or groups of individuals, and that they are discontinued when the objectives for which they were taken have been achieved.

## **E. Persons and communities requiring special protection**

### **1. Women**

25. Ensuring the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties.<sup>22</sup> Implementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research.<sup>23</sup>

### **2. Children**

26. Children play a fundamental role as the bearers and transmitters of cultural values from generation to generation. States parties should take all the steps necessary to stimulate and develop children's full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardians. In particular, when taking into consideration their obligations under the Covenant and other human rights instruments on the right to education, including with regard to the aims of education,<sup>24</sup> States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth.<sup>25</sup> Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies.

27. The Committee wishes to recall in this regard that educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. Such programmes should be included in school curricula for all, not only for minorities and indigenous peoples. States parties should adopt measures and spare no effort to ensure that educational programmes for minorities and indigenous groups are conducted on or in their own language, taking into consideration the wishes expressed by communities and in the international human rights standards in this area.<sup>26</sup> Educational programmes should also transmit the necessary knowledge to enable everyone to participate fully and on an equal footing in their own and in national communities.

<sup>22</sup> General comment No. 16 (2005), para. 16.

<sup>23</sup> *Ibid.*, para. 31.

<sup>24</sup> In particular articles 28 and 29 of the Convention on the Rights of the Child.

<sup>25</sup> World Declaration on Education for All: Meeting Basic Learning Needs, art. I-3.

<sup>26</sup> In particular the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169).

### 3. Older persons

28. The Committee is of the view that States parties to the Covenant are obligated to pay particular attention to the promotion and protection of the cultural rights of older persons. The Committee emphasizes the important role that older persons continue to play in most societies by reason of their creative, artistic and intellectual abilities, and as the transmitters of information, knowledge, traditions and cultural values. Consequently, the Committee attaches particular importance to the message contained in recommendations 44 and 48 of the Vienna International Plan of Action on Aging, calling for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture and spiritual values, and encouraging Governments and international organizations to support programmes aimed at providing older persons with easier physical access to cultural institutions (such as museums, theatres, concert halls and cinemas).<sup>27</sup>

29. The Committee therefore urges States parties to take account of the recommendations contained in the United Nations Principles for Older Persons, and in particular of principle 7, that older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations; and principle 16, that older persons should have access to the educational, cultural, spiritual and recreational resources of society.<sup>28</sup>

### 4. Persons with disabilities

30. Paragraph 17 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas, and that States should promote accessibility to and availability of places for cultural performances and services.<sup>29</sup>

31. In order to facilitate participation of persons with disabilities in cultural life, States parties should, *inter alia*, recognize the right of these persons to have access to cultural material, television programmes, films, theatre and other cultural activities, in accessible forms; to have access to places where cultural performances or services are offered, such as theatres, museums, cinemas, libraries and tourist services and, to the extent possible, to monuments and places of national cultural importance; to the recognition of their specific cultural and linguistic identity, including sign language and the culture of the deaf; and to the encouragement and promotion of their participation, to the extent possible, in recreational, leisure and sporting activities.<sup>30</sup>

### 5. Minorities

32. In the Committee's view, article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop their own culture.<sup>31</sup> This right entails the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have

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<sup>27</sup> General comment No. 6 (1995), paras. 38 and 40.

<sup>28</sup> General comment No. 6 (1995), para. 39.

<sup>29</sup> General Assembly resolution 48/96, annex.

<sup>30</sup> Convention on the Rights of Persons with Disabilities, art. 30.

<sup>31</sup> International Covenant on Civil and Political Rights, art. 27; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, para. 1 (1).

the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership.

33. Minorities, as well as persons belonging to minorities, have the right not only to their own identity but also to development in all areas of cultural life. Any programme intended to promote the constructive integration of minorities and persons belonging to minorities into the society of a State party should thus be based on inclusion, participation and non-discrimination, with a view to preserving the distinctive character of minority cultures.

## 6. Migrants

34. States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin.<sup>32</sup>

35. As education is intrinsically related to culture, the Committee recommends that States parties adopt appropriate measures to enable the children of migrants to attend, on a basis of equal treatment, State-run educational institution and programmes.

## 7. Indigenous peoples

36. States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples.<sup>33</sup> The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.<sup>34</sup> Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.<sup>35</sup> States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

37. Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games,

<sup>32</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31.

<sup>33</sup> See Declaration on the Rights of Indigenous Peoples, art. 1. See also ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), art. 1, para. 2.

<sup>34</sup> United Nations Declaration on the Rights of Indigenous Peoples, art. 26 (a).

<sup>35</sup> Convention No. 169, arts. 13–16. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 20 and 33.

and visual and performing arts.<sup>36</sup> States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.<sup>37</sup>

## 8. Persons living in poverty

38. The Committee considers that every person or group of persons is endowed with a cultural richness inherent in their humanity and therefore can make, and continues to make, a significant contribution to the development of culture. Nevertheless, it must be borne in mind that, in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture. The common underlying theme in the experience of persons living in poverty is a sense of powerlessness that is often a consequence of their situation. Awareness of their human rights, and particularly the right of every person to take part in cultural life, can significantly empower persons or groups of persons living in poverty.<sup>38</sup>

39. Culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation. Therefore, in implementing the legal obligations enshrined in article 15, paragraph 1 (a), of the Covenant, States parties must adopt, without delay, concrete measures to ensure adequate protection and the full exercise of the right of persons living in poverty and their communities to enjoy and take part in cultural life. In this respect, the Committee refers States parties to its statement on poverty and the International Covenant on Economic, Social and Cultural Rights.<sup>39</sup>

## F. Cultural diversity and the right to take part in cultural life

40. The protection of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, and requires the full implementation of cultural rights, including the right to take part in cultural life.<sup>40</sup>

41. Cultures have no fixed borders. The phenomena of migration, integration, assimilation and globalization have brought cultures, groups and individuals into closer contact than ever before, at a time when each of them is striving to keep their own identity.

42. Given that globalization has positive and negative effects, States parties must take appropriate steps to avoid its adverse consequences on the right to take part in cultural life, particularly for the most disadvantaged and marginalized individuals and groups, such as persons living in poverty. Far from having produced a single world culture, globalization has demonstrated that the concept of culture implies the coexistence of different cultures.

43. States parties should also bear in mind that cultural activities, goods and services have economic and cultural dimensions, conveying identity, values and meanings. They

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<sup>36</sup> ILO Convention No. 169, arts. 5 and 31. See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 11–13.

<sup>37</sup> ILO Convention No. 169, art. 6 (a). See also the United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

<sup>38</sup> See E/C.12/2001/10, para. 5.

<sup>39</sup> *Ibid.*, para. 14.

<sup>40</sup> See the Universal Declaration on Cultural Diversity, arts. 4 and 5.

must not be treated as having solely a commercial value.<sup>41</sup> In particular, bearing in mind article 15 (2) of the Covenant, States parties should adopt measures to protect and promote the diversity of cultural expressions,<sup>42</sup> and enable all cultures to express themselves and make themselves known.<sup>43</sup> In this respect, due regard should be paid to human rights standards, including the right to information and expression, and to the need to protect the free flow of ideas by word and image. The measures may also aim at preventing the signs, symbols and expressions of a particular culture from being taken out of context for the sole purpose of marketing or exploitation by the mass media.

### III. States parties' obligations

#### A. General legal obligations

44. The Covenant imposes on States parties the immediate obligation to guarantee that the right set out in article 15, paragraph 1 (a), is exercised without discrimination, to recognize cultural practices and to refrain from interfering in their enjoyment and development.<sup>44</sup>

45. While the Covenant provides for the "progressive" realization of the rights set out in its provisions and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life.<sup>45</sup>

46. As in the case of the other rights set out in the Covenant, regressive measures taken in relation to the right of everyone to take part in cultural life are not permitted. Consequently, if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.<sup>46</sup>

47. Given the interrelationship between the rights set out in article 15 of the Covenant (see paragraph 2 above), the full realization of the right of everyone to take part in cultural life also requires the adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity, in accordance with paragraphs 2 and 3, respectively, of article 15.<sup>47</sup>

<sup>41</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, preamble, para. 18. See also the Universal Declaration on Cultural Diversity, art. 8.

<sup>42</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. IV-5.

<sup>43</sup> See the Universal Declaration on Cultural Diversity, art. 6.

<sup>44</sup> See general comment No. 20 (2009).

<sup>45</sup> See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 44, No. 14 (2000), para. 31, No. 17 (2005), para. 26 and No. 18 (2005), para. 20. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 21.

<sup>46</sup> See general comments No. 3 (1990), para. 9, No. 13 (1999), para. 45, No. 14 (2000), para. 32, No. 17 (2005), para. 27 and No. 18 (2005), para. 21.

<sup>47</sup> See general comments No. 13 (1999), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22.

## B. Specific legal obligations

48. The right of everyone to take part in cultural life, like the other rights enshrined in the Covenant, imposes three types or levels of obligations on States parties: (a) the obligation to respect; (b) the obligation to protect; and (c) the obligation to fulfil. The obligation to respect requires States parties to refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life. The obligation to protect requires States parties to take steps to prevent third parties from interfering in the right to take part in cultural life. Lastly, the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.<sup>48</sup>

49. The obligation to respect includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group:

(a) To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected;

This includes the right not to be subjected to any form of discrimination based on cultural identity, exclusion or forced assimilation,<sup>49</sup> and the right of all persons to express their cultural identity freely and to exercise their cultural practices and way of life. States parties should consequently ensure that their legislation does not impair the enjoyment of these rights through direct or indirect discrimination.

(b) To enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind;

This implies the right of all persons to have access to, and to participate in, varied information exchanges, and to have access to cultural goods and services, understood as vectors of identity, values and meaning.<sup>50</sup>

(c) To enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any;

This obligation is closely related to the duty of States parties, under article 15, paragraph 3, “to respect the freedom indispensable for scientific research and creative activity”.

(d) To have access to their own cultural and linguistic heritage and to that of others;

In particular, States must respect 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. This includes the right to be taught about one’s own culture as well as those of others.<sup>51</sup> States parties must also respect the rights of indigenous

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<sup>48</sup> See general comments No. 13 (1990), paras. 46 and 47, No. 14 (2000), para. 33, No. 17 (2005), para. 28 and No. 18 (2005), para. 22. See also the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 6.

<sup>49</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 31

<sup>50</sup> Universal Declaration on Cultural Diversity, para. 8.

<sup>51</sup> Fribourg Declaration on Cultural Rights, arts. 6 (b) and 7 (b).

peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life.

(e) To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a).

50. In many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected. Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of rights listed in paragraph 49 above. In addition, States parties are obliged to:

(a) Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters;

Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations, in order to encourage creativity in all its diversity and to inspire a genuine dialogue between cultures. Such obligations include the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.<sup>52</sup>

(b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;

Particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.

(c) Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression;

This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.

(d) Promulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, taking into consideration articles 19 and 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.

51. The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.

52. States parties are under an obligation to facilitate the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right, such as:

(a) Adopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies; and measures aimed at enhancing diversity through public broadcasting in regional and minority languages;

<sup>52</sup> Universal Declaration on Cultural Diversity, art. 7.



(b) Adopting policies enabling persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practices and those of others, and to choose freely their way of life;

(c) Promoting the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights;

(d) Granting assistance, financial or other, to artists, public and private organizations, including science academies, cultural associations, trade unions and other individuals and institutions engaged in scientific and creative activities;

(e) Encouraging scientists, artists and others to take part in international scientific and cultural research activities, such as symposiums, conferences, seminars and workshops;

(f) Taking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture;

(g) Taking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life;

(h) Taking appropriate measures to create conditions conducive to a constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance;

(i) Taking appropriate measures to conduct public campaigns through the media, educational institutions and other available channels, with a view to eliminating any form of prejudice against individuals or communities, based on their cultural identity.

53. The obligation to promote requires States parties to take effective steps to ensure that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, or in relation to the specific situation of, inter alia, minorities and indigenous peoples. This includes education and awareness-raising on the need to respect cultural heritage and cultural diversity.

54. The obligation to fulfil requires that States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal. This level of obligation includes, for example:

(a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;

(b) Programmes aimed at preserving and restoring cultural heritage;

(c) The inclusion of cultural education at every level in school curricula, including history, literature, music and the history of other cultures, in consultation with all concerned;

(d) Guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events.

## C. Core obligations

55. In its general comment No. 3 (1990), the Committee stressed that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant. Thus, in accordance with the Covenant and other international instruments dealing with human rights and the protection of cultural diversity, the Committee considers that article 15, paragraph 1 (a), of the Covenant entails at least the obligation to create and promote 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, which includes the following core obligations applicable with immediate effect:

(a) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life;

(b) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;

(c) To respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments;

(d) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;

(e) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

## D. International obligations

56. In its general comment No. 3 (1990), the Committee draws attention to the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant. In the spirit of Article 56 of the Charter of the United Nations, as well as specific provisions of the International Covenant on Economic, Social and Cultural Rights (art. 2, para. 1, and arts. 15 and 23), States parties should recognize and promote the essential role of international cooperation in the achievement of the rights recognized in the Covenant, including the right of everyone to take part in cultural life, and should fulfil their commitment to take joint and separate action to that effect.

57. States parties should, through international agreements where appropriate, ensure that the realization of the right of everyone to take part in cultural life receives due attention.<sup>53</sup>

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<sup>53</sup> See general comment No. 18 (2005), para. 29.

58. The Committee recalls that international cooperation for development and thus for the realization of economic, social and cultural rights, including the right to take part in cultural life, is an obligation of States parties, especially of those States that are in a position to provide assistance. This obligation is in accordance with Articles 55 and 56 of the Charter of the United Nations, as well as articles 2, paragraph 1, and articles 15 and 23 of the Covenant.<sup>54</sup>

59. In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 (a), of the Covenant is not impaired. For example, the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.<sup>55</sup>

#### **IV. Violations**

60. To demonstrate compliance with their general and specific obligations, States parties must show that they have taken appropriate measures to ensure the respect for and protection of cultural freedoms, as well as the necessary steps towards the full realization of the right to take part in cultural life within their maximum available resources. States parties must also show that they have guaranteed that the right is enjoyed equally and without discrimination, by men and women.

61. In assessing whether States parties have complied with obligations to take action, the Committee looks at whether implementation is reasonable or proportionate with respect to the attainment of the relevant rights, complies with human rights and democratic principles, and whether it is subject to an adequate framework of monitoring and accountability.

62. Violations can occur through the direct action of a State party or of other entities or institutions that are insufficiently regulated by the State party, including, in particular, those in the private sector. Many violations of the right to take part in cultural life occur when States parties prevent access to cultural life, practices, goods and services by individuals or communities.

63. Violations of article 15, paragraph 1 (a), also occur through the omission or failure of a State party to take the necessary measures to comply with its legal obligations under this provision. Violations through omission include the failure to take appropriate steps to achieve the full realization of the right of everyone to take part in cultural life, and the failure to enforce relevant laws or to provide administrative, judicial or other appropriate remedies to enable people to exercise in full the right to take part in cultural life.

64. A violation also occurs when a State party fails to take steps to combat practices harmful to the well-being of a person or group of persons. These harmful practices, including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in article 15, paragraph 1 (a).

65. Any deliberately retrogressive measures in relation to the right to take part in cultural life would require the most careful consideration and need to be fully justified by

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<sup>54</sup> General comment No. 3 (1990), para. 14. See also general comment No. 18 (2005), para. 37.

<sup>55</sup> See general comment No. 18 (2005), para. 30.

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.

## **V. Implementation at the national level**

### **A. Legislation, strategies and policies**

66. While States parties have a wide margin of discretion in selecting the steps they consider most appropriate for the full realization of the right, they must immediately take those steps intended to guarantee access by everyone, without discrimination, to cultural life.

67. States parties must take the necessary steps without delay to guarantee immediately at least the minimum content of the core obligations (see paragraph 56 above). Many of these steps, such as those intended to guarantee non-discrimination *de jure*, do not necessarily require financial resources. While there may be other steps that require resources, these steps are nevertheless essential to ensure the implementation of that minimum content. Such steps are not static, and States parties are obliged to advance progressively towards the full realization of the rights recognized in the Covenant and, as far as the present general comment is concerned, of the right enshrined in article 15, paragraph 1 (a).

68. The Committee encourages States parties to make the greatest possible use of the valuable cultural resources that every society possesses and to bring them within the reach of everyone, paying particular attention to the most disadvantaged and marginalized individuals and groups, in order to ensure that everyone has effective access to cultural life.

69. The Committee emphasizes that inclusive cultural empowerment derived from the right of everyone to take part in cultural life is a tool for reducing the disparities so that everyone can enjoy, on an equal footing, the values of his or her own culture within a democratic society.

70. States parties, in implementing the right enshrined in article 15, paragraph 1 (a), of the Covenant, should go beyond the material aspects of culture (such as museums, libraries, theatres, cinemas, monuments and heritage sites) and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods (such as language, knowledge and traditions).

### **B. Indicators and benchmarks**

71. In their national strategies and policies, States parties should identify appropriate indicators and benchmarks, including disaggregated statistics and time frames that allow them to monitor effectively the implementation of the right of everyone to take part in cultural life, and also to assess progress towards the full realization of this right.

### **C. Remedies and accountability**

72. The strategies and policies adopted by States parties should provide for the establishment of effective mechanisms and institutions, where these do not exist, to investigate and examine alleged infringements of article 15, paragraph 1 (a), identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims.

## VI. Obligations of actors other than States

73. While compliance with the Covenant is mainly the responsibility of States parties, all members of civil society — individuals, groups, communities, minorities, indigenous peoples, religious bodies, private organizations, business and civil society in general — also have responsibilities in relation to the effective implementation of the right of everyone to take part in cultural life. States parties should regulate the responsibility incumbent upon the corporate sector and other non-State actors with regard to the respect for this right.

74. Communities and cultural associations play a fundamental role in the promotion of the right of everyone to take part in cultural life at the local and national levels, and in cooperating with States parties in the implementation of their obligations under article 15, paragraph 1 (a).

75. The Committee notes that, as members of international organizations such as United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations (FAO), the World Health Organization (WHO) and the World Trade Organization (WTO), States parties have an obligation to adopt whatever measures they can to ensure that the policies and decisions of those organizations in the field of culture and related areas are in conformity with their obligations under the Covenant, in particular the obligations contained in article 15 article 2, paragraph 1, and articles 22 and 23, concerning international assistance and cooperation.

76. United Nations organs and specialized agencies, should, within their fields of competence and in accordance with articles 22 and 23 of the Covenant, adopt international measures likely to contribute to the progressive implementation of article 15, paragraph 1 (a). In particular, UNESCO, WIPO, ILO, FAO, WHO and other relevant agencies, funds and programmes of the United Nations are called upon to intensify their efforts to take into account human rights principles and obligations in their work concerning the right of everyone to take part in cultural life, in cooperation with the Office of the United Nations High Commissioner for Human Rights.

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**Committee on Economic, Social and Cultural Rights****General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)****I. Introduction**

1. The right to sexual and reproductive health is an integral part of the right to health enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights.<sup>1</sup> It is also reflected in other international human rights instruments.<sup>2</sup> The adoption of the Programme of Action of the International Conference on Population and Development in 1994 further highlighted reproductive and sexual health issues within the human rights framework.<sup>3</sup> Since then, international and regional human rights standards and jurisprudence related to the right to sexual and reproductive health have considerably evolved. Most recently, the 2030 Agenda for Sustainable Development includes goals and targets to be achieved in the area of sexual and reproductive health.<sup>4</sup>

2. Due to numerous legal, procedural, practical and social barriers, access to the full range of sexual and reproductive health facilities, services, goods and information is seriously restricted. In fact, the full enjoyment of the right to sexual and reproductive health

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<sup>1</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14 (2000) on the right to the highest attainable standard of health, paras. 2, 8, 11, 16, 21, 23, 34 and 36.

<sup>2</sup> See Convention on the Elimination of All Forms of Discrimination against Women, art. 12; Convention on the Rights of the Child, arts. 17, 23-25 and 27; and Convention on the Rights of Persons with Disabilities, arts. 23 and 25. See also Committee on the Elimination of Discrimination against Women general recommendation No. 24 (1999) on women and health, paras 11, 14, 18, 23, 26, 29, 31 (b); and Committee on the Rights of the Child general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health.

<sup>3</sup> *Report of the International Conference on Population and Development, Cairo 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex. The Programme of Action is based on 15 principles. Principle 1 states that “All human beings are born free and equal in dignity and rights”.

<sup>4</sup> United Nations, *Transforming our World: the 2030 Agenda for Sustainable Development*, adopted by the General Assembly in September 2015. Goal 3 of the 2030 Agenda is “Ensure healthy lives and promote well-being for all at all ages”, and Goal 5 is “Achieve gender equality and empower all women and girls”.



remains a distant goal for millions of people, especially for women and girls, throughout the world. Certain individuals and population groups that experience multiple and intersecting forms of discrimination that exacerbate exclusion in both law and practice, such as lesbian, gay, bisexual, transgender and intersex persons<sup>5</sup> and persons with disabilities, the full enjoyment of the right to sexual and reproductive health is further restricted.

3. The present general comment is aimed at assisting State parties in their implementation of the Covenant and fulfilling their reporting obligations thereunder. It concerns primarily the obligation of States parties to ensure every individual's enjoyment of the right to sexual and reproductive health, as required under article 12, but is also related to other provisions of the Covenant.

4. In its general comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), the Committee has already addressed in part the issue of sexual and reproductive health. Considering the continuing grave violations of this right, however, the Committee is of the view that the issue deserves a separate general comment.

## II. Context

5. The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant.

6. Sexual health and reproductive health are distinct from, but closely linked, to each other. Sexual health, as defined by the World Health Organization (WHO), is "a state of physical, emotional, mental and social well-being in relation to sexuality".<sup>6</sup> Reproductive health, as described in the Programme of Action of the International Conference on Population and Development, concerns the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour.<sup>7</sup>

### Underlying and social determinants

7. In its general comment No. 14, the Committee stated that the right to the highest attainable standard of health not only included the absence of disease and infirmity and the right to the provision of preventive, curative and palliative health care, but also extended to the underlying determinants of health. The same is applicable to the right to sexual and

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<sup>5</sup> For the purpose of the present general comment, references to lesbian, gay, bisexual, transgender and intersex persons include other persons who face violations of their rights on the basis of their actual or perceived sexual orientation, gender identity and sex characteristics, including those who may identify with other terms. For intersex persons, see fact sheet available from [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf).

<sup>6</sup> See WHO, *Sexual Health, Human Rights and the Law* (2015), working definition on sexual health, sect. 1.1.

<sup>7</sup> See Programme of Action of the International Conference on Population and Development, chap. 7.

reproductive health. It extends beyond sexual and reproductive health care to the underlying determinants of sexual and reproductive health, including access to safe and potable water, adequate sanitation, adequate food and nutrition, adequate housing, safe and healthy working conditions and environment, health-related education and information, and effective protection from all forms of violence, torture and discrimination and other human rights violations that have a negative impact on the right to sexual and reproductive health.

8. Further, the right to sexual and reproductive health is also deeply affected by “social determinants of health”, as defined by WHO.<sup>8</sup> In all countries, patterns of sexual and reproductive health generally reflect social inequalities in society and unequal distribution of power based on gender, ethnic origin, age, disability and other factors. Poverty, income inequality, systemic discrimination and marginalization based on grounds identified by the Committee are all social determinants of sexual and reproductive health, which also have an impact on the enjoyment of an array of other rights as well.<sup>9</sup> The nature of these social determinants, which are often expressed in laws and policies, limits the choices that individuals can exercise with respect to their sexual and reproductive health. Therefore, to realize the right to sexual and reproductive health, States parties must address the social determinants as manifested in laws, institutional arrangements and social practices that prevent individuals from effectively enjoying in practice their sexual and reproductive health.

#### **Interdependence with other human rights**

9. The realization of the right to sexual and reproductive health requires that States parties also meet their obligations under other provisions of the Covenant. For example, the right to sexual and reproductive health, combined with the right to education (articles 13 and 14) and the right to non-discrimination and equality between men and women (articles 2 (2) and 3), entails a right to education on sexuality and reproduction that is comprehensive, non-discriminatory, evidence-based, scientifically accurate and age appropriate.<sup>10</sup> The right to sexual and reproductive health, combined with the right to work (article 6) and just and favourable working conditions (article 7), as well as the right to non-discrimination and equality between men and women, also requires States to ensure employment with maternity protection and parental leave for workers, including workers in vulnerable situations, such as migrant workers or women with disabilities, as well as protection from sexual harassment in the workplace and prohibition of discrimination based on pregnancy, childbirth, parenthood,<sup>11</sup> sexual orientation, gender identity or intersex status.

10. The right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often leads to maternal mortality and morbidity, which in turn constitutes a violation of the

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<sup>8</sup> WHO Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health – Final Report of the Commission on Social Determinants of Health* (2008).

<sup>9</sup> See Committee on Economic, Social and Cultural Rights general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

<sup>10</sup> A/65/162.

<sup>11</sup> See Convention on the Elimination of All Forms of Discrimination against Women, art. 11 (1) (f) and 11 (2).



right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.<sup>12</sup>

### **III. Normative content of the right to sexual and reproductive health**

#### **A. Elements of the right to sexual and reproductive health**

11. The right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health. Following the elaboration in the Committee's general comment No. 14, comprehensive sexual and reproductive health care contains the four interrelated and essential elements described below.<sup>13</sup>

##### **Availability**

12. An adequate number of functioning health-care facilities, services, goods and programmes should be available to provide the population with the fullest possible range of sexual and reproductive health care. This includes ensuring the availability of facilities, goods and services for the guarantee of the underlying determinants of the realization of the right to sexual and reproductive health, such as safe and potable drinking water and adequate sanitation facilities, hospitals and clinics.

13. Ensuring the availability of trained medical and professional personnel and skilled providers who are trained to perform the full range of sexual and reproductive health-care services is a critical component of ensuring availability.<sup>14</sup> Essential medicines should also be available, including a wide range of contraceptive methods, such as condoms and emergency contraception, medicines for abortion and for post-abortion care, and medicines, including generic medicines, for the prevention and treatment of sexually transmitted infections and HIV.<sup>15</sup>

14. Unavailability of goods and services due to ideologically based policies or practices, such as the refusal to provide services based on conscience, must not be a barrier to accessing services. An adequate number of health-care providers willing and able to

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<sup>12</sup> See Human Rights Committee Communication No. 1153/2003, *Karen Noelia Llantoy Huamán v. Peru*, views adopted on 24 October 2005; Committee on the Elimination of Discrimination against Women communication No. 17/2008, *Alyne da Silva Pimentel v. Brazil*, views adopted on 25 July 2011; CAT/C/SLV/CO/2, para. 23; and CAT/C/NIC/CO/1, para. 16.

<sup>13</sup> In paragraph 12 of general comment No. 14, the Committee defined normative elements of state obligations to guarantee the right to health. These standards also apply to the underlying determinants, or the preconditions of health, including access to sexuality education and sexual and reproductive health information. See also Committee on the Rights of the Child general comment No. 15, which applied those norms to adolescents. States parties should provide health services that are sensitive to the particular needs and human rights of all adolescents.

<sup>14</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14, para. 12 (a); and A/HRC/21/22 and Corr.1 and 2, para. 20.

<sup>15</sup> Essential medicines are defined by WHO as "those that satisfy the priority health care needs of the population" and that "are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality, and at a price the individual and community can afford". See Committee on Economic, Social and Cultural Rights general comment No. 14; and WHO, Model List of Essential Medicines, 19th ed. (2015).

provide such services should be available at all times in both public and private facilities and within reasonable geographical reach.<sup>16</sup>

### **Accessibility**

15. Health facilities, goods, information and services related to sexual and reproductive health care<sup>17</sup> should be accessible to all individuals and groups without discrimination and free from barriers. As elaborated in the Committee's general comment No. 14, accessibility includes physical accessibility, affordability and information accessibility.

#### *Physical accessibility*

16. Health facilities, goods, information and services related to sexual and reproductive health care must be available within safe physical and geographical reach for all, so that persons in need can receive timely services and information. Physical accessibility should be ensured for all, especially persons belonging to disadvantaged and marginalized groups, including, but not limited to, persons living in rural and remote areas, persons with disabilities, refugees and internally displaced persons, stateless persons and persons in detention. When dispensing sexual and reproductive services to remote areas is impracticable, substantive equality calls for positive measures to ensure that persons in need have communication and transportation to such services.

#### *Affordability*

17. Publicly or privately provided sexual and reproductive health services must be affordable for all. Essential goods and services, including those related to the underlying determinants of sexual and reproductive health, must be provided at no cost or based on the principle of equality to ensure that individuals and families are not disproportionately burdened with health expenses. People without sufficient means should be provided with the support necessary to cover the costs of health insurance and access to health facilities providing sexual and reproductive health information, goods and services.<sup>18</sup>

#### *Information accessibility*

18. Information accessibility includes the right to seek, receive and disseminate information and ideas concerning sexual and reproductive health issues generally, and also for individuals to receive specific information on their particular health status. All individuals and groups, including adolescents and youth, have the right to evidence-based information on all aspects of sexual and reproductive health, including maternal health, contraceptives, family planning, sexually transmitted infections, HIV prevention, safe abortion and post-abortion care, infertility and fertility options, and reproductive cancer.

19. Such information must be provided in a manner consistent with the needs of the individual and the community, taking into consideration, for example, age, gender, language ability, educational level, disability, sexual orientation, gender identity and

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<sup>16</sup> *International Planned Parenthood Federation – European Network v. Italy*, complaint No. 87/2012 (2014), resolution adopted by the Committee of Ministers of the Council of Europe on 30 April 2014.

<sup>17</sup> Reference in the present document to health facilities, goods and services includes the underlying determinants.

<sup>18</sup> See, generally, Committee on Economic, Social and Cultural Rights general comment No. 14, para. 19.

intersex status.<sup>19</sup> Information accessibility should not impair the right to have personal health data and information treated with privacy and confidentiality.

### **Acceptability**

20. All facilities, goods, information and services related to sexual and reproductive health must be respectful of the culture of individuals, minorities, peoples and communities and sensitive to gender, age, disability, sexual diversity and life-cycle requirements. However, this cannot be used to justify the refusal to provide tailored facilities, goods, information and services to specific groups.

### **Quality**

21. Facilities, goods, information and services related to sexual and reproductive health must be of good quality, meaning that they are evidence-based and scientifically and medically appropriate and up-to-date. This requires trained and skilled health-care personnel and scientifically approved and unexpired drugs and equipment. The failure or refusal to incorporate technological advances and innovations in the provision of sexual and reproductive health services, such as medication for abortion,<sup>20</sup> assisted reproductive technologies and advances in the treatment of HIV and AIDS, jeopardizes the quality of care.

## **B. Special topics of broad application**

### **Non-discrimination and equality**

22. Article 2 (2) of the Covenant provides that all individuals and groups shall not be discriminated against and shall enjoy equal rights. All individuals and groups should be able to enjoy equal access to the same range, quality and standard of sexual and reproductive health facilities, information, goods and services, and to exercise their rights to sexual and reproductive health without experiencing any discrimination.

23. Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. Criminalization of sex between consenting adults of the same gender or the expression of one's gender identity is a clear violation of human rights. Likewise, regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients, or requiring that they be "cured" by so-called "treatment", are a clear violation of their right to sexual and reproductive health. State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.

24. Non-discrimination and equality require not only legal and formal equality but also substantive equality. Substantive equality requires that the distinct sexual and reproductive health needs of particular groups, as well as any barriers that particular groups may face, be addressed. The sexual and reproductive health needs of particular groups should be given tailored attention. For example, persons with disabilities should be able to enjoy not only the same range and quality of sexual and reproductive health services but also those

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<sup>19</sup> Council of Europe Commissioner for Human Rights, "Human rights and intersex people", issue paper (2015).

<sup>20</sup> WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2nd ed. (2012).

services which they would need specifically because of their disabilities.<sup>21</sup> Further, reasonable accommodation must be made to enable persons with disabilities to fully access sexual and reproductive health services on an equal basis, such as physically accessible facilities, information in accessible formats and decision-making support, and States should ensure that care is provided in a respectful and dignified manner that does not exacerbate marginalization.

### **Equality between women and men, and gender perspective**

25. Due to women's reproductive capacities, the realization of the right of women to sexual and reproductive health is essential to the realization of the full range of their human rights. The right of women to sexual and reproductive health is indispensable to their autonomy and their right to make meaningful decisions about their lives and health. Gender equality requires that the health needs of women, different from those of men, be taken into account and appropriate services provided for women in accordance with their life cycles.

26. The experiences of women of systemic discrimination and violence throughout their lives require comprehensive understanding of the concept of gender equality in the right to sexual and reproductive health. Non-discrimination on the basis of sex, as guaranteed in article 2 (2) of the Covenant, and the equality of women, as guaranteed in article 3, require the removal of not only direct discrimination but also indirect discrimination, and the ensuring of formal as well as substantive equality.<sup>22</sup>

27. Seemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive equality requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health. Gender-based stereotypes, assumptions and expectations related to women being the subordinates of men and their role being solely as caregivers and mothers, in particular, are obstacles to substantive gender equality, including the equal right to sexual and reproductive health, and need to be modified or eliminated, as does the role of men solely as heads of household and breadwinners.<sup>23</sup> At the same time, special measures, both temporary and permanent, are necessary to accelerate the de facto equality of women and to protect maternity.<sup>24</sup>

28. The realization of the rights of women and gender equality, both in law and in practice, requires repealing or reforming discriminatory laws, policies and practices in the area of sexual and reproductive health. Removal of all barriers interfering with access by women to comprehensive sexual and reproductive health services, goods, education and information is required. To lower rates of maternal mortality and morbidity requires emergency obstetric care and skilled birth attendance, including in rural and remote areas, and prevention of unsafe abortions. Preventing unintended pregnancies and unsafe abortions requires States to adopt legal and policy measures to guarantee all individuals access to affordable, safe and effective contraceptives and comprehensive sexuality education, including for adolescents; to liberalize restrictive abortion laws; to guarantee

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<sup>21</sup> See Convention on the Rights of Persons with Disabilities, art. 25.

<sup>22</sup> Committee on Economic, Social and Cultural Rights general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights.

<sup>23</sup> See Convention on the Elimination of All Forms of Discrimination against Women, art. 5.

<sup>24</sup> Article 4 (1) of the Convention on the Elimination of All Forms of Discrimination against Women is concerned with "temporary special measures aimed at accelerating de facto equality between men and women", while article 4 (2) focuses on "special measures... aimed at protecting maternity". See also Committee on Economic, Social and Cultural Rights general comment No. 16, para. 15.

women and girls access to safe abortion services and quality post-abortion care, including by training health-care providers; and to respect the right of women to make autonomous decisions about their sexual and reproductive health.<sup>25</sup>

29. It is also important to undertake preventive, promotional and remedial action to shield all individuals from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as female genital mutilation, child and forced marriage and domestic and sexual violence, including marital rape, among other things. States parties must put in place laws, policies and programmes to prevent, address and remediate violations of the right of all individuals to autonomous decision-making on matters regarding their sexual and reproductive health, free from violence, coercion and discrimination.

### **Intersectionality and multiple discrimination**

30. Individuals belonging to particular groups may be disproportionately affected by intersectional discrimination in the context of sexual and reproductive health. As identified by the Committee,<sup>26</sup> groups such as, but not limited to, poor women, persons with disabilities, migrants, indigenous or other ethnic minorities, adolescents, lesbian, gay, bisexual, transgender and intersex persons, and people living with HIV/AIDS are more likely to experience multiple discrimination. Trafficked and sexually exploited women, girls and boys are subject to violence, coercion and discrimination in their everyday lives, with their sexual and reproductive health at great risk. Also, women and girls living in conflict situations are disproportionately exposed to a high risk of violation of their rights, including through systematic rape, sexual slavery, forced pregnancy and forced sterilization.<sup>27</sup> Measures to guarantee non-discrimination and substantive equality should be cognizant of and seek to overcome the often exacerbated impact that intersectional discrimination has on the realization of the right to sexual and reproductive health.

31. Laws, policies and programmes, including temporary special measures, are required to prevent and eliminate discrimination, stigmatization and negative stereotyping that hinder access to sexual and reproductive health. Prisoners, refugees, stateless persons, asylum seekers and undocumented migrants, given their additional vulnerability by condition of their detention or legal status, are also groups with specific needs that require the State to take particular steps to ensure their access to sexual and reproductive information, goods and health care. States must ensure that individuals are not subject to harassment for exercising their right to sexual and reproductive health. Eliminating systemic discrimination will also frequently require devoting greater resources to traditionally neglected groups<sup>28</sup> and ensuring that anti-discrimination laws and policies are implemented in practice by officials and others.

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<sup>25</sup> A/69/62; see also WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, 2nd ed. (2012).

<sup>26</sup> Including groups that are discriminated against on the grounds of race and colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including ethnicity, age, nationality, marital and family status, disability, sexual orientation and gender identity, intersex status, health status, place of residence, economic and social situation or other status, and those facing multiple forms of discrimination. See Committee on Economic, Social and Cultural Rights general comment No. 20.

<sup>27</sup> See Vienna Declaration and Programme of Action of 1993 (A/CONF.157/23), para. 38; and Beijing Declaration and Platform for Action of 1995 (A/CONF.177/20), para. 135.

<sup>28</sup> See Committee on Economic, Social and Cultural Rights general comment No. 20, para. 39.

32. States parties should take measures to fully protect persons working in the sex industry against all forms of violence, coercion and discrimination. They should ensure that such persons have access to the full range of sexual and reproductive health-care services.

## IV. Obligations of States parties

### A. General legal obligations

33. As prescribed by article 2 (1) of the Covenant, States parties must take steps, to the maximum of their available resources, with a view to achieving progressively the full realization of the right to sexual and reproductive health. States parties must move as expeditiously and effectively as possible towards the full realization of the highest attainable standard of sexual and reproductive health. This means that, while full realization of the goal may be achieved progressively, steps towards it must be taken immediately or within a reasonably short period of time. Such steps should be deliberate, concrete and targeted, using all appropriate means, particularly including, but not limited to, the adoption of legislative and budgetary measures.

34. States parties are under immediate obligation to eliminate discrimination against individuals and groups and to guarantee their equal right to sexual and reproductive health. This requires States to repeal or reform laws and policies that nullify or impair the ability of certain individuals and groups to realize their right to sexual and reproductive health. There exists a wide range of laws, policies and practices that undermine autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health, for example criminalization of abortion or restrictive abortion laws. States parties should also ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face.

35. States must adopt the measures necessary to eliminate conditions and combat attitudes that perpetuate inequality and discrimination, particularly on the basis of gender, in order to enable all individuals and groups to enjoy sexual and reproductive health on the basis of equality.<sup>29</sup> States must recognize, and take measures to rectify, entrenched social norms and power structures that impair the equal exercise of that right, such as gender roles, which have an impact on the social determinants of health. Such measures must address and eliminate discriminatory stereotypes, assumptions and norms concerning sexuality and reproduction that underlie restrictive laws and undermine the realization of sexual and reproductive health.

36. As needed, States should implement temporary special measures to overcome long-standing discrimination and entrenched stereotypes against certain groups and to eradicate conditions that perpetuate discrimination. States should focus on ensuring that all individuals and groups effectively enjoy their right to sexual and reproductive health on a substantively equal basis.

37. A State party has the duty to establish that it has obtained the maximum available resources, including those made available through international assistance and cooperation, with a view to complying with its obligations under the Covenant.

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<sup>29</sup> See Committee on Economic, Social and Cultural Rights general comment No. 16, paras. 6-9.

38. Retrogressive measures should be avoided and, if such measures are applied, the State party has the burden of proving their necessity.<sup>30</sup> This applies equally in the context of sexual and reproductive health. Examples of retrogressive measures include the removal of sexual and reproductive health medications from national drug registries; laws or policies revoking public health funding for sexual and reproductive health services; imposition of barriers to information, goods and services relating to sexual and reproductive health; enacting laws criminalizing certain sexual and reproductive health conduct and decisions; and legal and policy changes that reduce oversight by States of the obligation of private actors to respect the right of individuals to access sexual and reproductive health services. In the extreme circumstances under which retrogressive measures may be inevitable, States must ensure that such measures are only temporary, do not disproportionately affect disadvantaged and marginalized individuals and groups, and are not applied in an otherwise discriminatory manner.

## **B. Specific legal obligations**

39. States parties have an obligation to respect, protect and fulfil the right of everyone to sexual and reproductive health.

### **Obligation to respect**

40. The obligation to respect requires States to refrain from directly or indirectly interfering with the exercise by individuals of the right to sexual and reproductive health. States must not limit or deny anyone access to sexual and reproductive health, including through laws criminalizing sexual and reproductive health services and information, while confidentiality of health data should be maintained. States must reform laws that impede the exercise of the right to sexual and reproductive health. Examples include laws criminalizing abortion, non-disclosure of HIV status, exposure to and transmission of HIV, consensual sexual activities between adults, and transgender identity or expression.<sup>31</sup>

41. The obligation to respect also requires States to repeal, and refrain from enacting, laws and policies that create barriers in access to sexual and reproductive health services. This includes third-party authorization requirements, such as parental, spousal and judicial authorization requirements for access to sexual and reproductive health services and information, including for abortion and contraception; biased counselling and mandatory waiting periods for divorce, remarriage or access to abortion services; mandatory HIV testing; and the exclusion of particular sexual and reproductive health services from public funding or foreign assistance funds. The dissemination of misinformation and the imposition of restrictions on the right of individuals to access information about sexual and reproductive health also violates the duty to respect human rights. National and donor States must refrain from censoring, withholding, misrepresenting or criminalizing the provision of information on sexual and reproductive health,<sup>32</sup> both to the public and to

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<sup>30</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14, para. 32.

<sup>31</sup> See e.g. E/C.12/1/Add.105 and Corr.1, para. 53; Committee on the Elimination of Discrimination against Women general recommendation No. 24, paras. 24 and 31 (c); A/66/254; and A/HRC/14/20.

<sup>32</sup> Committee on Economic, Social and Cultural Rights general comment No. 14; and Committee on the Rights of the Child general comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child.

individuals. Such restrictions impede access to information and services, and can fuel stigma and discrimination.<sup>33</sup>

### **Obligation to protect**

42. The obligation to protect requires States to take measures to prevent third parties from directly or indirectly interfering with the enjoyment of the right to sexual and reproductive health. The duty to protect requires States to put in place and implement laws and policies prohibiting conduct by third parties that causes harm to physical and mental integrity or undermines the full enjoyment of the right to sexual and reproductive health, including the conduct of private health-care facilities, insurance and pharmaceutical companies, and manufacturers of health-related goods and equipment. This includes the prohibition of violence and discriminatory practices, such as the exclusion of particular individuals or groups from the provision of sexual and reproductive health services.

43. States must prohibit and prevent private actors from imposing practical or procedural barriers to health services, such as physical obstruction of facilities, dissemination of misinformation, informal fees and third-party authorization requirements. Where health-care providers are allowed to invoke conscientious objection, States must appropriately regulate this practice to ensure that it does not inhibit anyone's access to sexual and reproductive health care, including by requiring referrals to an accessible provider capable of and willing to provide the services being sought, and that it does not inhibit the performance of services in urgent or emergency situations.<sup>34</sup>

44. States are obliged to ensure that adolescents have full access to appropriate information on sexual and reproductive health, including family planning and contraceptives, the dangers of early pregnancy and the prevention and treatment of sexually transmitted diseases, including HIV/AIDS, regardless of their marital status and whether their parents or guardians consent, with respect for their privacy and confidentiality.<sup>35</sup>

### **Obligation to fulfil**

45. The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health.<sup>36</sup> States should aim to ensure universal access without discrimination for all individuals, including those from disadvantaged and marginalized groups, to a full range of quality sexual and reproductive health care, including maternal health care; contraceptive information and services; safe abortion care; and prevention, diagnosis and treatment of infertility, reproductive cancers, sexually transmitted infections and HIV/AIDS, including with generic medicines. States must guarantee physical and mental health care for survivors of sexual and domestic violence in all situations, including access to post-exposure prevention, emergency contraception and safe abortion services.

46. The obligation to fulfil also requires States to take measures to eradicate practical barriers to the full realization of the right to sexual and reproductive health, such as disproportionate costs and lack of physical or geographical access to sexual and

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<sup>33</sup> Amnesty International, *Left Without a Choice: Barriers to Reproductive Health in Indonesia* (2010).

<sup>34</sup> See E/C.12/POL/CO/5, para. 28; A/66/254, paras. 24 and 65 (m); and Committee on the Elimination of Discrimination against Women general recommendation No. 24, para. 11.

<sup>35</sup> See Committee on the Rights of the Child general comment No. 4, paras. 28 and 33.

<sup>36</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14, paras. 33 and 36-37.



reproductive health care. States must ensure that health-care providers are adequately trained on the provision of quality and respectful sexual and reproductive health services and ensure that such providers are equitably distributed throughout the State.

47. States must develop and enforce evidence-based standards and guidelines for the provision and delivery of sexual and reproductive health services, and such guidance must be routinely updated to incorporate medical advancements. At the same time, States are required to provide age-appropriate, evidence-based, scientifically accurate comprehensive education for all on sexual and reproductive health.<sup>37</sup>

48. States must also take affirmative measures to eradicate social barriers in terms of norms or beliefs that inhibit individuals of different ages and genders, women, girls and adolescents from autonomously exercising their right to sexual and reproductive health. Social misconceptions, prejudices and taboos about menstruation, pregnancy, delivery, masturbation, wet dreams, vasectomy and fertility should be modified so that these do not obstruct an individual's enjoyment of the right to sexual and reproductive health.

### C. Core obligations

49. States parties have a core obligation to ensure, at the very least, minimum essential levels of satisfaction of the right to sexual and reproductive health. In this regard, States parties should be guided by contemporary human rights instruments and jurisprudence,<sup>38</sup> as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA).<sup>39</sup> The core obligations include at least the following:

(a) To repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information;

(b) To adopt and implement a national strategy and action plan, with adequate budget allocation, on sexual and reproductive health, which is devised, periodically reviewed and monitored through a participatory and transparent process, disaggregated by prohibited ground of discrimination;

(c) To guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged and marginalized groups;

(d) To enact and enforce the legal prohibition of harmful practices and gender-based violence, including female genital mutilation, child and forced marriage and domestic and sexual violence, including marital rape, while ensuring privacy,

<sup>37</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14; Committee on the Elimination of Discrimination against Women general recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, para. 52 (c); and Committee on the Rights of the Child general comment No. 15, para. 60.

<sup>38</sup> See, for example, [www.icpdbeyond2014.org](http://www.icpdbeyond2014.org); Committee on the Elimination of Discrimination against Women communications No. 17/2008, and No. 22/2009, *L.C. v. Peru*, views adopted on 17 October 2011; and general comments and recommendations of Committee on the Rights of the Child and Committee on the Elimination of Discrimination against Women.

<sup>39</sup> See e.g. Inter-agency Field Manual on Reproductive Health in Humanitarian Settings (Inter-agency Working Group on Reproductive Health in Crises, 2010), available from [www.who.int/reproductivehealth/publications/emergencies/field\\_manual\\_rh\\_humanitarian\\_settings.pdf](http://www.who.int/reproductivehealth/publications/emergencies/field_manual_rh_humanitarian_settings.pdf); and publications by UNFPA on sexual and reproductive health, available from [www.unfpa.org/sexual-reproductive-health](http://www.unfpa.org/sexual-reproductive-health).

confidentiality and free, informed and responsible decision-making, without coercion, discrimination or fear of violence, in relation to the sexual and reproductive needs and behaviours of individuals;

(e) To take measures to prevent unsafe abortions and to provide post-abortion care and counselling for those in need;

(f) To ensure all individuals and groups have access to comprehensive education and information on sexual and reproductive health that are non-discriminatory, non-biased, evidence-based, and that take into account the evolving capacities of children and adolescents;

(g) To provide medicines, equipment and technologies essential to sexual and reproductive health, including based on the WHO Model List of Essential Medicines;<sup>40</sup>

(h) To ensure access to effective and transparent remedies and redress, including administrative and judicial ones, for violations of the right to sexual and reproductive health.

#### **D. International obligations**

50. International cooperation and assistance are key elements of article 2 (1) of the Covenant and are crucial for the realization of the right to sexual and reproductive health. In compliance with article 2 (1), States that are not able to comply with their obligations and that cannot realize the right to sexual and reproductive health due to a lack of resources must seek international cooperation and assistance. States that are in a position to do so must respond to such requests in good faith and in accordance with the international commitment of contributing at a minimum 0.7 per cent of their gross national income for international cooperation and assistance.

51. States parties should ensure, in compliance with their Covenant obligations, that their bilateral, regional and international agreements dealing with intellectual property or trade and economic exchange do not impede access to medicines, diagnostics or related technologies required for prevention or treatment of HIV/AIDS or other diseases related to sexual and reproductive health. States should ensure that international agreements and domestic legislation incorporate to the fullest extent any safeguards and flexibilities therein that may be used to promote and ensure access to medicines and health care for all. States parties should review their international agreements, including on trade and investment, to ensure that they are consistent with the protection of the right to sexual and reproductive health, and should amend them as necessary.

52. Donor States and international actors have an obligation to comply with human rights standards, which are also applicable to sexual and reproductive health. To this end, international assistance should not impose restrictions on information or services existing in donor States, draw trained reproductive health-care workers away from recipient countries or push recipient countries to adopt models of privatization. Also, donor States should not reinforce or condone legal, procedural, practical or social barriers to the full enjoyment of sexual and reproductive health that exist in the recipient countries.

53. Intergovernmental organizations, and in particular the United Nations and its specialized agencies, programmes and bodies, have a crucial role to play and contribution to make with regard to the universal realization of the right to sexual and reproductive health. The World Health Organization, UNFPA, the United Nations Entity for Gender

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<sup>40</sup> See WHO Model List of Essential Medicines, sect. 18.3.

Equality and the Empowerment of Women (UN–Women), the Office of the United Nations High Commissioner for Human Rights and other United Nations entities provide technical guidance and information, as well as capacity-building and strengthening. They should cooperate effectively with States parties, building on their respective expertise in relation to the implementation of the right to sexual and reproductive health at the national level, with due respect to their individual mandates, in collaboration with civil society.<sup>41</sup>

## V. Violations

54. Violations of the right to sexual and reproductive health can occur through the direct action of States or other entities that are insufficiently regulated by States. Violations through acts of commission include the adoption of legislation, regulations, policies or programmes that create barriers to the realization of the right to sexual and reproductive health in the State party or in third countries, or the formal repeal or suspension of legislation, regulations, policies or programmes that are necessary for the continued enjoyment of the right to sexual and reproductive health.

55. Violations through acts of omission include the failure to take appropriate steps towards the full realization of everyone's right to sexual and reproductive health and the failure to enact and enforce relevant laws. Failure to ensure formal and substantive equality in the enjoyment of the right to sexual and reproductive health constitutes a violation of this right. The elimination of de jure as well as de facto discrimination is required for the equal enjoyment of the right to sexual and reproductive health.<sup>42</sup>

56. Violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health. Such violations include State interference with an individual's freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard. They also occur when the State removes or suspends laws and policies that are necessary for the enjoyment of the right to sexual and reproductive health.

57. Examples of violations of the obligation to respect include the establishment of legal barriers impeding access by individuals to sexual and reproductive health services, such as the criminalization of women undergoing abortions and the criminalization of consensual sexual activity between adults. Banning or denying access in practice to sexual and reproductive health services and medicines, such as emergency contraception, also violates the obligation to respect. Laws and policies that prescribe involuntary, coercive or forced medical interventions, including forced sterilization or mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect.

58. Laws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect. Further violations include state practices and policies that censor or withhold information, or present inaccurate, misrepresentative or discriminatory information, related to sexual and reproductive health.

59. Violations of the obligation to protect occur when a State fails to take effective steps to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health. This includes the failure to prohibit and take measures to prevent all forms of violence and coercion committed by private individuals and entities, including

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<sup>41</sup> See Committee on Economic, Social and Cultural Rights general comment No. 14, paras. 63-65.

<sup>42</sup> See Committee on Economic, Social and Cultural Rights general comment No. 16, para. 41.

domestic violence, rape (including marital rape), sexual assault, abuse and harassment, including during conflict, post-conflict and transition situations; violence targeting lesbian, gay, bisexual, transgender and intersex persons or women seeking abortion or post-abortion care; harmful practices such as female genital mutilation, child and forced marriage, forced sterilization, forced abortion and forced pregnancy; and medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children.

60. States must effectively monitor and regulate specific sectors, such as private health-care providers, health insurance companies, educational and child-care institutions, institutional care facilities, refugee camps, prisons and other detention centres, to ensure that they do not undermine or violate enjoyment by individuals of the right to sexual and reproductive health. States have an obligation to ensure that private health insurance companies do not refuse to cover sexual and reproductive health services. Furthermore, States also have an extraterritorial obligation<sup>43</sup> to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries, for example through non-consensual testing of contraceptives or medical experiments.

61. Violations of the obligation to fulfil occur when States do not take all necessary steps to facilitate, promote and provide for the right to sexual and reproductive health within maximum available resources. Such violations arise when States fail to adopt and implement a holistic and inclusive national health policy that adequately and comprehensively includes sexual and reproductive health or when a policy fails to appropriately address the needs of disadvantaged and marginalized groups.

62. Violations of the obligation to fulfil also occur when States fail to progressively ensure that sexual and reproductive health facilities, goods and services are available, accessible, acceptable and of good quality. Examples of such violations include the failure to guarantee access to the full range of contraceptive options so that all individuals are able to utilize an appropriate method that suits their particular situation and needs.

63. In addition, violations of the obligation to fulfil occur when States fail to take affirmative measures to eradicate legal, procedural, practical and social barriers to the enjoyment of the right to sexual and reproductive health and to ensure that health-care providers treat all individuals seeking sexual and reproductive health care in a respectful and non-discriminatory manner. Violation of the obligation to fulfil also occur when States fail to take measures to ensure that up-to-date, accurate information on sexual and reproductive health is publicly available and accessible to all individuals, in appropriate languages and formats, and to ensure that all educational institutions incorporate unbiased, scientifically accurate, evidence-based, age-appropriate and comprehensive sexuality education into their required curricula.

## VI. Remedies

64. States must ensure that all individuals have access to justice and to meaningful and effective remedy in instances in which the right to sexual and reproductive health is violated. Remedies include, but are not limited to, adequate, effective and prompt reparation in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as appropriate. The effective exercise of the right to remedy requires funding access to justice and information about the existence of these remedies. It

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<sup>43</sup> Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

is also important that the right to sexual and reproductive health be enshrined in laws and policies and be fully justiciable at the national level, and that judges, prosecutors and lawyers be made aware of that such a right can be enforced. When third parties contravene the right to sexual and reproductive health, States must ensure that such violations are investigated and prosecuted, and that the perpetrators are held accountable, while the victims of such violations are provided with remedies.

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## Committee on Economic, Social and Cultural Rights

### General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)

#### I. Introduction

1. The right of everyone to the enjoyment of just and favourable conditions of work is recognized in the International Covenant on Economic, Social and Cultural Rights and other international and regional human rights treaties,<sup>1</sup> as well as related international legal instruments, including conventions and recommendations of the International Labour Organization (ILO).<sup>2</sup> It is an important component of other labour rights enshrined in the

<sup>1</sup> See Universal Declaration of Human Rights, arts. 23 and 24; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 11; Convention on the Rights of the Child, art. 32; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 25; Convention on the Rights of Persons with Disabilities, art. 27; European Social Charter (Revised), Part I, paras. 2, 3, 4, 7 and 8; and Part II, arts. 2, 3 and 4; Charter of Fundamental Rights of the European Union, arts. 14, 23, 31 and 32; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 7; and African Charter on Human and Peoples' Rights, art. 15. The wording of the provisions in the various treaties differs. The European instruments are broader in the protections offered, while the African Charter includes the narrower requirement of "equal pay for equal work".

<sup>2</sup> Although many ILO conventions relate directly and indirectly to just and favourable conditions of work, for the present general comment, the Committee has identified the following as relevant: Hours of Work (Industry) Convention, 1919 (No. 1); Weekly Rest (Industry) Convention, 1921 (No. 14); Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47); Protection of Wages Convention, 1949 (No. 95); Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99); Equal Remuneration Convention, 1951 (No. 100); Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Wage Fixing Convention, 1970 (No. 131); Holidays with Pay Convention (Revised), 1970 (No. 132); Minimum Age Convention, 1973 (No. 138); Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153); Occupational Safety and Health Convention, 1981 (No. 155); Protocol of 2002 to the Occupational Safety and Health Convention, 1981; Workers with Family Responsibilities Convention, 1981 (No. 156); Night Work Convention, 1990 (No. 171); Part-Time Work Convention, 1994 (No. 175); Maternity Protection Convention, 2000 (No. 183);



Covenant and the corollary of the right to work as freely chosen and accepted. Similarly, trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work.<sup>3</sup> In turn, social security compensates for the lack of work-related income and complements labour rights.<sup>4</sup> The enjoyment of the right to just and favourable conditions of work is a prerequisite for, and result of, the enjoyment of other Covenant rights, for example, the right to the highest attainable standard of physical and mental health, by avoiding occupational accidents and disease, and an adequate standard of living through decent remuneration.

2. The importance of the right to just and favourable conditions of work has yet to be fully realized. Almost 50 years after the adoption of the Covenant, the level of wages in many parts of the world remains low and the gender pay gap is a persistent and global problem. ILO estimates that annually some 330 million people are victims of accidents at work and that there are 2 million work-related fatalities.<sup>5</sup> Almost half of all countries still regulate weekly working hours above the 40-hour work week, with many establishing a 48-hour limit, and some countries have excessively high average working hours. In addition, workers in special economic, free trade and export processing zones are often denied the right to just and favourable conditions of work through non-enforcement of labour legislation.

3. Discrimination, inequality and a lack of assured rest and leisure conditions plague many of the world's workers. Economic, fiscal and political crises have led to austerity measures that claw back advances. The increasing complexity of work contracts, such as short-term and zero-hour contracts, and non-standard forms of employment, as well as an erosion of national and international labour standards, collective bargaining and working conditions, have resulted in insufficient protection of just and favourable conditions of work. Even in times of economic growth, many workers do not enjoy such conditions of work.

4. The Committee is aware that the concept of work and workers has evolved from the time of drafting of the Covenant to include new categories, such as self-employed workers, workers in the informal economy, agricultural workers, refugee workers and unpaid workers. Following up on general comment No. 18 on the right to work, and benefiting from its experience in the consideration of reports of States parties, the present general comment has been drafted by the Committee with the aim of contributing to the full implementation of article 7 of the Covenant.

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Convention concerning the Promotional Framework for Occupational Safety and Health, 2006 (No. 187); and Domestic Workers Convention, 2011 (No. 189).

<sup>3</sup> Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, paragraph 2, indicates the interconnection between the right to work in a general sense in article 6 of the Covenant, the recognition of the individual dimension of the right to the enjoyment of just and favourable conditions of work in article 7 and the collective dimension in article 8.

<sup>4</sup> See Committee on Economic, Social and Cultural Rights general comment No. 19 (2007) on the right to social security, para. 2.

<sup>5</sup> According to ILO, the overall number of work-related fatal and non-fatal accidents and diseases globally did not vary significantly during the period 1998 to 2008, although the global figure hides variations among countries and regions.

## II. Normative content

5. The right to just and favourable conditions of work is a right of everyone, without distinction of any kind. The reference to “everyone” highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers. The reference to “everyone” reinforces the general prohibition on discrimination in article 2 (2) and the equality provision in article 3 of the Covenant, and is supplemented by the various references to equality and freedom from distinctions of any kind in sub-articles 7 (a) (i) and (c).

6. Article 7 identifies a non-exhaustive list of fundamental elements to guarantee just and favourable conditions of work. The reference to the term “in particular” indicates that other elements, not explicitly referred to, are also relevant. In this context, the Committee has systematically underlined factors such as the following: prohibition of forced labour and social and economic exploitation of children and young persons; freedom from violence and harassment, including sexual harassment; and paid maternity, paternity and parental leave.

### A. Article 7 (a): remuneration which provides all workers, as a minimum, with:

#### 1. Remuneration

7. The term “remuneration” goes beyond the more restricted notion of “wage” or “salary” to include additional direct or indirect allowances in cash or in kind paid by the employer to the employee that should be of a fair and reasonable amount, such as grants, contributions to health insurance, housing and food allowances, and on-site affordable childcare facilities.<sup>6</sup>

8. It is clear that the reference to “a minimum” in article 7 (a) is designed to ensure that the article should in no case limit efforts to improve remuneration to a level above those standards.<sup>7</sup> This minimum applies to “all workers”, reflecting the term “everyone” in the chapeau.

9. The minimum criteria for remuneration are: fair wages, equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (art. 7 (a) (i)); and a decent living for workers and their families (art. 7 (a) (ii)).

#### 2. Fair wages

10. All workers have the right to a fair wage. The notion of a fair wage is not static, since it depends on a range of non-exhaustive objective criteria, reflecting not only the output of the work but also the responsibilities of the worker, the level of skill and education required to perform the work, the impact of the work on the health and safety of the worker, specific hardships related to the work and the impact on the worker’s personal

<sup>6</sup> This understanding is supported by article 1 (a) of the ILO Equal Remuneration Convention, 1951 (No. 100), which has been ratified by 171 States.

<sup>7</sup> See Travaux Préparatoires A/2929 (1955), para. 5. See also Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Oxford, Clarendon Press, 1995), chap. 6, sect. II.B.



and family life.<sup>8,9</sup> Any assessment of fairness should also take into account the position of female workers, particularly where their work and pay has traditionally been undervalued. Where workers have precarious contracts, supplements to the wage, as well as other measures to guard against arbitrariness, may be necessary in the interest of fairness to mitigate the lack of job security. Workers should not have to pay back part of their wages for work already performed and should receive all wages and benefits legally due upon termination of a contract or in the event of the bankruptcy or judicial liquidation of the employer. Employers are prohibited from restricting the freedom of workers to dispose of their remuneration. Prisoners who agree to work should receive a fair wage. For the clear majority of workers, fair wages are above the minimum wage. Wages should be paid in a regular, timely fashion and in full.

**3. Equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work**

11. Not only should workers receive equal remuneration when they perform the same or similar jobs, but their remuneration should also be equal even when their work is completely different but nonetheless of equal value when assessed by objective criteria. This requirement goes beyond only wages or pay to include other payments or benefits paid directly or indirectly to workers. Although equality between men and women is particularly important in this context and even merits a specific reference in article 7 (a) (i), the Committee reiterates that equality applies to all workers without distinction based on race, ethnicity, nationality, migration or health status, disability, age, sexual orientation, gender identity or any other ground.<sup>10</sup>

12. The extent to which equality is being achieved requires an ongoing objective evaluation of whether the work is of equal value and whether the remuneration received is equal.<sup>11</sup> It should cover a broad selection of functions. Since the focus should be on the “value” of the work, evaluation factors should include skills, responsibilities and effort required by the worker, as well as working conditions. It could be based on a comparison of rates of remuneration across organizations, enterprises and professions.

13. Objective job evaluation is important to avoid indirect discrimination when determining rates of remuneration and comparing the relative value of different jobs. For example, a distinction between full-time and part-time work — such as the payment of bonuses only to full-time employees — might indirectly discriminate against women

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<sup>8</sup> The 2014 ILO Study on *Minimum Wage Systems* suggests that the notion of a fair wage comprises the notions of a minimum wage and a living wage (the latter more closely related to article 7 (a) (ii) of the Covenant), the notion of a fair wage being broader.

<sup>9</sup> In the present general comment, the relationship between wages and the cost of living is understood to fall more clearly as a consideration under article 7 (a) (ii); however, it is also important to emphasize that the notion of a “fair wage” and remuneration for a decent living are interdependent.

<sup>10</sup> See art. 2 (2) of the Covenant; and Committee on Economic, Social and Cultural Rights general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

<sup>11</sup> The ILO Equal Remuneration Convention 1951 (No. 100), article 1 (b), refers to “equal remuneration for work of equal value” as “rates of remuneration established without discrimination on the basis of sex”. The Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111) extends the principle of equal remuneration for work of equal value to other grounds upon which discrimination is prohibited. In making an explicit reference to “without distinction”, article 7 of the Covenant goes beyond Convention No. 100 to protect against discrimination on grounds other than sex.

employees if a higher percentage of women are part-time workers.<sup>12</sup> Similarly, the objective evaluation of the work must be free from gender bias.

14. Equal remuneration for work of equal value applies across all sectors. Where the State has direct influence over rates of remuneration, equality should be achieved in the public sector as rapidly as possible, ensuring equal remuneration for work of equal value in the civil service at the central, provincial and local levels, as well as for work under public contract or in enterprises either fully or partially owned by the State.<sup>13</sup>

15. Remuneration set through collective agreements should be aimed at ensuring equality for work of equal value. States parties should adopt legislation and other measures to promote equal remuneration for work of equal value, including in the private sphere, for example, by encouraging the establishment of a classification of jobs without regard to sex; fixing time-bound targets for achieving equality, and reporting requirements designed to assess whether targets have been met; and requiring progressive decreases in the differentials between rates of remuneration for men and women for work of equal value.<sup>14</sup> States parties should consider the introduction of a wide range of vocational and other training measures for women, including in non-traditional fields of study and work.

16. The notion of “conditions of work for women not inferior to those enjoyed by men” and “equal pay for equal work” mentioned in the second part of article 7 (i) (a) are more restrictive than the notion of equal remuneration for work of equal value. First, the former are specifically related to direct discrimination on the basis of sex, while “equal remuneration for work of equal value” is without distinction on any ground. Second, they focus on a narrower comparison between the same job or post, normally in the same enterprise or organization, instead of the broader recognition of remuneration based on the value of work. Therefore, in the specific situation in which a man and a woman perform the same or similar functions, both workers must receive the same pay, but this should not detract from the requirement to take immediate steps towards the broader obligation of achieving equal remuneration for men and women for work of equal value.

17. “Conditions of work” in this particular subparagraph include the “conditions” identified in the work contract that can affect the rate of remuneration, as well as broader “conditions” referred to in other paragraphs of article 7. Thus, a woman performing work of equal value to that of a male counterpart should not have fewer contractual protections or more arduous contractual requirements. This requirement does not prevent women from enjoying specific conditions of work relating to pregnancy and maternity protection.

#### **4. Remuneration that provides all workers with a decent living for themselves and their families**

18. Closely linked to the notions of fairness and equality, “remuneration” must also provide a “decent living” for workers and their families. While fair wages and equal remuneration are determined by reference to the work performed by an individual worker, as well as in comparison with other workers, remuneration that provides a decent living must be determined by reference to outside factors such as the cost of living and other prevailing economic and social conditions. Thus, remuneration must be sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing and additional expenses such as commuting costs.

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<sup>12</sup> See ILO Part-Time Work Convention 1994 (No. 175), art. 5.

<sup>13</sup> Adapted from Equal Remuneration Recommendation, 1951 (No. 90), paras. 1-2.

<sup>14</sup> See ILO Equal Remuneration Recommendation 1951 (No. 90), paras. 4-5.

19. A minimum wage is “the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract”.<sup>15</sup> It provides a means of ensuring remuneration for a decent living for workers and their families.

20. States parties should prioritize the adoption of a periodically reviewed minimum wage, indexed at least to the cost of living, and maintain a mechanism to do this. Workers, employers and their representative organizations should participate directly in the operation of such a mechanism.

21. Minimum wages can be effective only if they are adequate to the goals set forth in article 7. The minimum wage should be recognized in legislation, fixed with reference to the requirements of a decent living, and applied consistently. The elements to take into account in fixing the minimum wage are flexible, although they must be technically sound, including the general level of wages in the country, the cost of living, social security contributions and benefits, and relative living standards. The minimum wage might represent a percentage of the average wage, so long as this percentage is sufficient to ensure a decent living for workers and their families.<sup>16</sup>

22. In setting the minimum wage, reference to wages paid for work of equal value in sectors subject to collective wage agreements is relevant, as is the general level of salaries in the country or locality in question. The requirements of economic and social development and achievement of a high level of employment also need to be considered, but the Committee underlines that such factors should not be used to justify a minimum wage that does not ensure a decent living for workers and their families. While recognizing that minimum wages are often frozen during times of economic and financial crisis, the Committee further underlines that, in order for States parties to comply with article 7 of the Covenant, such a measure has to be taken as a last resort and must be of a temporary nature, bearing in mind the needs of workers in vulnerable situations, with a return to the standard procedures of periodic review and increase in the minimum wage as swiftly as possible.<sup>17</sup>

23. The minimum wage should apply systematically, protecting as much as possible the fullest range of workers, including workers in vulnerable situations. The minimum wage might apply generally or differ across sectors, regions, zones and professional categories,<sup>18</sup> so long as the wages apply without direct or indirect discrimination and ensure a decent living. In setting minimum wages at the sector or industry level, the work performed in sectors predominantly employing women, minorities or foreign workers should not be undervalued compared with work in sectors predominantly employing men or nationals. It is particularly important to ensure that the job evaluation methods used to align or adjust sectoral or occupational minimum wage schemes are not inherently discriminatory.

24. The failure of employers to respect the minimum wage should be subject to penal or other sanctions. Appropriate measures, including effective labour inspections, are necessary to ensure the application of minimum wage provisions in practice. States parties should provide adequate information on minimum wages in relevant languages and dialects, as well as in accessible formats for workers with disabilities and illiterate workers.

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<sup>15</sup> This is the definition relied upon by the ILO Committee of Experts on the Application of Conventions and Recommendations in a number of its reports and other documents.

<sup>16</sup> The European Committee of Social Rights has indicated that remuneration, to be fair, must be in any event above the poverty line in the country, i.e. 50 per cent of the national average wage.

<sup>17</sup> Letter of the Chair of the Committee on Economic, Social and Cultural Rights to States parties on austerity measures, May 2012.

<sup>18</sup> See ILO Minimum Wage Fixing Recommendation, 1970 (No. 135), Part III, para. 5.

## B. Article 7 (b): safe and healthy working conditions

25. Preventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health.<sup>19</sup> States parties should adopt a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment<sup>20</sup> and ensuring broad participation in the formulation, implementation and review of such a policy, in particular of workers, employers and their representative organizations.<sup>21</sup> While full prevention of occupational accidents and diseases might not be possible, the human and other costs of not taking action far outweigh the financial burden on States parties for taking immediate preventative steps that should be increased over time.<sup>22</sup>

26. The national policy should cover all branches of economic activity, including the formal and informal sectors, and all categories of workers,<sup>23</sup> including non-standard workers, apprentices and interns. It should take into account specific risks to the safety and health of female workers in the event of pregnancy, as well as of workers with disabilities, without any form of discrimination against these workers. Workers should be able to monitor working conditions without fear of reprisal.

27. The policy should address at least the following areas:<sup>24</sup> design, testing, choice, substitution, installation, arrangement, use and maintenance of the material elements of work (workplaces, working environment, work processes, tools, machinery and equipment, as well as chemical, physical and biological substances and agents); the relationship between the main elements of work and the physical and mental capacities of workers, including their ergonomic requirements; training of relevant personnel; and protection of workers and representative organizations from disciplinary measures when they have acted in conformity with the national policy, such as in response to imminent and serious danger.

28. In particular, the policy should indicate specific actions required of employers in areas such as prevention and response to accidents and disease, as well as recording and providing notification about relevant data, given the fundamental responsibility of the employer to protect the health and safety of workers. It should also include a mechanism, which might be a central body, for coordination of policy implementation and support programmes and with the authority to undertake periodic reviews. To assist with the review, the policy should promote the collection and dissemination of reliable and valid data on the fullest possible range of occupational accidents and disease, including accidents involving workers while commuting to and from work.<sup>25</sup> Data collection should respect human rights principles, including confidentiality of personal and medical data,<sup>26</sup> as well as the need for disaggregation of data by sex and other relevant grounds.

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<sup>19</sup> See art. 12 (2) (b) and (c) of the Covenant.

<sup>20</sup> See ILO Occupational Safety and Health Convention, 1981 (No. 155), art. 4 (1).

<sup>21</sup> Ibid.

<sup>22</sup> See Craven, *The International Covenant on Economic, Social, and Cultural Rights*, chap. 6, sect. III.C.

<sup>23</sup> See ILO Occupational Safety and Health Convention, 1981 (No. 155), arts. 1 (1) and 2 (1). In particular, policies should include protection of domestic workers, as well as temporary workers, part-time workers, apprentices, self-employed persons, migrant workers and workers in the informal sector.

<sup>24</sup> See ILO Occupational Safety and Health Convention, 1981 (No. 155), arts. 5 (a), (b), (c) and (e).

<sup>25</sup> See Protocol of 2002 to the ILO Occupational Safety and Health Convention, 1981 (No. 155), art. 1 (d).

<sup>26</sup> Ibid., art. 3 (d).

29. The policy should incorporate appropriate monitoring and enforcement provisions, including effective investigations, and provide adequate penalties in case of violations, including the right of enforcement authorities to suspend the operation of unsafe enterprises. Workers affected by a preventable occupational accident or disease should have the right to a remedy, including access to appropriate grievance mechanisms, such as courts, to resolve disputes. In particular, States parties should ensure that workers suffering from an accident or disease and, where relevant, the dependants of those workers, receive adequate compensation, including for costs of treatment, loss of earnings and other costs, as well as access to rehabilitation services.

30. Access to safe drinking water, adequate sanitation facilities that also meet women's specific hygiene needs, and materials and information to promote good hygiene are essential elements of a safe and healthy working environment. Paid sick leave is critical for sick workers to receive treatment for acute and chronic illnesses and to reduce infection of co-workers.

**C. Article 7 (c): equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence**

31. All workers have the right to equal opportunity for promotion through fair, merit-based and transparent processes that respect human rights. The applicable criteria of seniority and competence should also include an assessment of individual circumstances, as well as the different roles and experiences of men and women, in order to ensure equal opportunities for all. There should be no place for irrelevant criteria such as personal preference or family, political and social links. Similarly, workers must have the opportunity for promotion free from reprisals related to trade union or political activity. The reference to equal opportunity requires that hiring, promotion and termination not be discriminatory. This is highly relevant for women and other workers, such as workers with disabilities, workers from certain ethnic, national and other minorities, lesbian, gay, bisexual, transgender and intersex workers, older workers and indigenous workers.

32. Equality in promotion requires the analysis of direct and indirect obstacles to promotion, as well as the introduction of measures such as training and initiatives to reconcile work and family responsibilities, including affordable day-care services for children and dependent adults. In order to accelerate de facto equality, temporary special measures might be necessary.<sup>27</sup> They should be regularly reviewed and appropriate sanctions applied in the event of non-compliance.

33. In the public sector, States parties should introduce objective standards for hiring, promotion and termination that are aimed at achieving equality, particularly between men and women. Public sector promotions should be subject to impartial review. For the private sector, States parties should adopt relevant legislation, such as comprehensive non-discrimination legislation, to guarantee equal treatment in hiring, promotion and termination, and undertake surveys to monitor changes over time.

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<sup>27</sup> See Committee on Economic, Social and Cultural Rights general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural , para. 15; and general comment No. 20, paras. 38 and 39.

## **D. Article 7 (d): rest, leisure, reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays**

34. Rest and leisure, limitation of working hours and paid periodic holidays help workers to maintain an appropriate balance between professional, family and personal responsibilities and to avoid work-related stress, accidents and disease. They also promote the realization of other Covenant rights; therefore, although States parties have flexibility in the light of the national context, they are required to set minimum standards that must be respected and cannot be denied or reduced on the basis of economic or productivity arguments. States parties should introduce, maintain and enforce laws, polices and regulations covering several factors, as outlined below.

### **1. Limits on daily hours of work**

35. Working days spent in all activities, including unpaid work, should be limited to a specified number of hours. While the general daily limit (without overtime) should be eight hours,<sup>28</sup> the rule should take into account the complexities of the workplace and allow for flexibility, responding, for example, to different types of work arrangements such as shift work, consecutive work shifts, work during emergencies and flexible working arrangements. Exceptions should be strictly limited and subject to consultation with workers and their representative organizations. Where legislation permits longer working days, employers should compensate for longer days with shorter working days so that the average number of working hours over a period of weeks does not exceed the general principle of eight hours per day.<sup>29</sup> Requirements for workers to be on-call or on standby need to be taken into account in the calculation of hours of work.

36. Legislation should establish the maximum number of daily hours of work, which could vary in the light of the exigencies of different employment activities but should not go beyond what is considered a reasonable maximum work day. Measures aimed at assisting workers to reconcile work with family responsibilities should not reinforce stereotyped assumptions that men are the main breadwinners and that women should bear the main responsibility for the household. If substantive equality is to be achieved, both male and female workers with family responsibilities should benefit from the measures on an equal footing.<sup>30</sup>

### **2. Limits on weekly hours of work**

37. The number of hours of work per week should also be limited through legislation. The same criteria as indicated for daily limits on working hours apply. The limitation should apply across all sectors and for all types of work, including unpaid work. Reduced working weeks may apply, for instance, in relation to arduous activities. The Committee is aware that many States parties have opted for a 40-hour week and recommends that States parties that have not yet done so take steps progressively to achieve this target.<sup>31</sup> Legislation

<sup>28</sup> See ILO Hours of Work (Industry) Convention, 1919 (No. 1), art. 2, and Hours of Work (Commerce and Offices) Convention, 1930 (No. 30), art. 3. While very wide in scope, they do not cover all areas of economic activity, such as agricultural and domestic workers, that later ILO conventions and recommendations take on board.

<sup>29</sup> Adapted from ILO Hours of Work (Industry) Convention, 1919 (No. 1), art. 2 (c) (referring strictly to shift work).

<sup>30</sup> ILO Workers with Family Responsibilities Convention, 1981 (No. 156).

<sup>31</sup> See ILO, "Working time in the twenty-first century", report for discussion at the Tripartite Meeting of Experts on Working-time Arrangements (17-21 October 2011), para. 40, which notes that 41 per cent of countries provide for a regular 40-hour workweek.

should allow for some flexibility to go beyond the limited number of hours of work per week, corresponding to different working arrangements and sectors. However, as a general rule, the hours per week, averaged over a period of time, should meet the statutory standard working week. Workers should receive additional pay for overtime hours above the maximum permitted hours worked in any given week.

### **3. Daily rest periods**

38. Rest during the day is important for the health and safety of workers and therefore legislation should identify and protect rest periods during the work day. Where workers operate machinery or undertake tasks that can affect the life and health of themselves and others, legislation should include mandatory rest periods. Legislation should also include specific regulations on rest periods for night workers and acknowledge certain situations, for example, those of pregnant women, lactating women who may require rest periods in order to breastfeed, or workers undergoing medical treatment. Daily rest periods should take into account possibilities for flexible working arrangements which allow for extended working days in return for an additional day of rest in a weekly or fortnightly period.

### **4. Weekly rest periods**

39. All workers must enjoy weekly rest periods, in principle amounting to at least 24 consecutive hours every period of seven days,<sup>32</sup> although two consecutive days of rest for workers is preferable as a general rule to ensure their health and safety. Days of rest should correspond to the customs and traditions of the country and the workers in question<sup>33</sup> and apply simultaneously to all staff in the enterprise or workplace.<sup>34</sup>

40. Temporary exceptions should be permissible in certain cases such as accidents, force majeure, urgent work requirements and abnormal pressure of work or to prevent the loss of perishable goods<sup>35</sup> and where the nature of the service provided requires work on generally applied days of rest, such as weekend retail work. In such cases, workers should receive compensatory rest as much as possible within the seven-day work period and for at least 24 hours.<sup>36</sup> Any exceptions should be agreed through consultation with workers and employers and their representative organizations.

### **5. Paid annual leave**

41. All workers, including part-time and temporary workers, must have paid annual leave.<sup>37</sup> Legislation should identify the entitlement, at a minimum, of three working weeks of paid leave for one year of full-time service. Workers should receive at least the normal pay for the corresponding period of holidays. Legislation should also specify minimum service requirements, not exceeding six months, for paid leave. In such situations, the worker should nonetheless enjoy paid leave proportionate to the period of employment.

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<sup>32</sup> See ILO Weekly Rest (Industry) Convention, 1921 (No. 14), art. 2 (1); and Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 6 (1).

<sup>33</sup> See ILO Weekly Rest (Industry) Convention, 1921 (No. 14), art. 2 (3); and Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 6 (3) and 6 (4).

<sup>34</sup> See ILO Weekly Rest (Industry) Convention, 1921 (No. 14), art. 2 (2); and Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 6 (2).

<sup>35</sup> See ILO Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106), art. 8 (1); see also ILO, "Working time in the twenty-first century", para. 21.

<sup>36</sup> See ILO Weekly Rest (Industry) Convention, 1921 (No. 14), art. 5; and Weekly Rest (Commerce and Offices) Convention 1957 (No. 106), art. 8 (3).

<sup>37</sup> See ILO Holidays with Pay Convention (Revised), 1970 (No. 132), arts. 2, 3, 4, 5 (1), 6, 7 (1), 8 (2), 11 and 12.

Leave due to illness or other justified reasons should not be deducted from paid annual leave.

42. Part-time workers should receive paid annual leave equivalent to that of comparable full-time workers and proportionate to hours of work. A failure to include part-time workers in the scope of legislation will lead to inequality between men and women where a higher proportion of women rely on part-time work, for example, when returning to work after maternity leave.

43. The timing for taking paid annual leave should be subject to a negotiated decision between the employer and the worker; however, legislation should set a minimum period of ideally two weeks of uninterrupted paid annual leave. Workers may not relinquish such leave, including in exchange for compensation. Upon termination of employment, workers should receive the period of annual leave outstanding or alternative compensation amounting to the same level of pay entitlement or holiday credit.

44. Legislation should identify other forms of leave, in particular entitlements to maternity, paternity and parental leave, to leave for family reasons and to paid sick leave. Workers should not be placed on temporary contracts in order to be excluded from such leave entitlements.

## **6. Paid public holidays**

45. Workers should benefit from a set number of public holidays with payment of wages equivalent to those for a normal working day. Workers who have to work on public holidays should receive at least the same wage as on a normal working day, as well as compensatory leave corresponding to the time worked. The setting of a minimum work requirement for entitlement to paid public holidays should be prohibited by law. Paid public holidays should not be counted as part of annual leave entitlements.

## **7. Flexible working arrangements**

46. In the light of contemporary developments in labour law and practice, the development of a national policy on flexibility in the workplace might be appropriate. Such a policy could include flexible arrangements in the scheduling of working hours, for example through flextime, compressed working weeks and job-sharing, as well as flexibility regarding the place of work to include work at home, telework or work from a satellite work centre. Those measures can also contribute towards a better balance between work and family responsibilities, provided they respond to the different requirements and challenges faced by male and female workers. Flexible working arrangements must meet the needs of both workers and employers, and in no case should they be used to undermine the right to just and favourable conditions of work.

## **E. Special topics of broad application**

47. The right to just and favourable conditions of work relates to specific workers:

(a) *Female workers*: Progress on the three key interrelated indicators for gender equality in the context of labour rights — the “glass ceiling”, the “gender pay gap” and the “sticky floor” — remains far from satisfactory. Intersectional discrimination and the absence of a life-cycle approach regarding the needs of women lead to accumulated disadvantages that have a negative impact on the right to just and favourable conditions of work and other rights. Particular attention is needed to address occupational segregation by sex and to achieve equal remuneration for work of equal value, as well as equal opportunity for promotion, including through the introduction of temporary special measures. Any assessment of the “value” of work must avoid gender stereotypes that could undervalue



work predominantly performed by women. States parties should take into account the different requirements of male and female workers. For example, specific measures might be necessary to protect the safety and health of pregnant workers in relation to travel or night work. Day-care services in the workplace and flexible working arrangements can promote equal conditions of work in practice. Workers benefiting from gender-specific measures should not be penalized in other areas. States parties must take measures to address traditional gender roles and other structural obstacles that perpetuate gender inequality;

(b) *Young workers and older workers*: All workers should be protected against age discrimination. Young workers should not suffer wage discrimination, for example, being forced to accept low wages that do not reflect their skills. An excessive use of unpaid internships and training programmes, as well as of short-term and fixed-term contracts that negatively affect job security, career prospects and social security benefits, is not in line with the right to just and favourable conditions of work. Laws and regulations should include specific measures to protect the health and safety of young workers, including through raising the minimum age for certain types of work.<sup>38</sup> Older workers should receive fair wages and equal remuneration for work of equal value, and have equal opportunity for promotion based on their experience and know-how.<sup>39</sup> Specific health and safety measures might be necessary, and older workers should benefit from pre-retirement programmes, if they so wish.<sup>40</sup> The cumulative effects of discrimination against female workers through the life cycle might require targeted measures to achieve equality and guarantee fair wages, equal opportunities for promotion and equal pension rights;

(c) *Workers with disabilities*: At times, workers with disabilities require specific measures to enjoy the right to just and favourable conditions of work on an equal basis with others. Workers with disabilities should not be segregated in sheltered workshops. They should benefit from an accessible work environment and must not be denied reasonable accommodation, like workplace adjustments or flexible working arrangements. They should also enjoy equal remuneration for work of equal value and must not suffer wage discrimination due to a perceived reduced capacity for work;

(d) *Workers in the informal economy*: Although these workers account for a significant percentage of the world's workforce, they are often excluded from national statistics and legal protection, support and safeguards, exacerbating vulnerability. While the overall objective should be to formalize work, laws and policies should explicitly extend to workers in the informal economy and States parties should take steps to gather relevant disaggregated data so as to include this category of workers in the progressive realization of the right to just and favourable conditions of work. For that purpose, the informal economy should be included in the mandate of the respective monitoring and enforcement mechanism. Women are often overrepresented in the informal economy, for example, as casual workers, home workers or own-account workers, which in turn exacerbates inequalities in areas such as remuneration, health and safety, rest, leisure and paid leave;

(e) *Migrant workers*: These workers, in particular if they are undocumented, are vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments. Such vulnerability is increased by abusive labour practices that give the employer control over the migrant worker's residence status or that tie migrant workers to a specific employer. If they do not speak the national language(s), they might be less

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<sup>38</sup> See ILO Minimum Age Convention, 1973 (No. 138), arts. 3 and 7.

<sup>39</sup> See Committee on Economic, Social and Cultural Rights general comment No. 6 (1995) on the economic, social and cultural rights of older persons, para. 23.

<sup>40</sup> *Ibid.*, para. 24.

aware of their rights and unable to access grievance mechanisms. Undocumented workers often fear reprisals from employers and eventual expulsion if they seek to complain about working conditions. Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work. Internal migrant workers are also vulnerable to exploitation and require legislative and other measures to ensure their right to just and favourable conditions of work;

(f) *Domestic workers*: The vast majority of domestic workers are women. Many belong to ethnic or national minorities or are migrants. They are often isolated and can be exploited, harassed and, in some cases, notably those involving live-in domestic workers, subject to slave-like conditions. They frequently do not have the right to join trade unions or the freedom to communicate with others. Due to stereotyped perceptions, the skills required for domestic work are undervalued; as a result, it is among the lowest paid occupations. Domestic workers have the right to just and favourable conditions of work,<sup>41</sup> including protection against abuse, harassment and violence, decent working conditions, paid annual leave, normal working hours, daily and weekly rest on the basis of equality with other workers, minimum wage coverage where this exists, remuneration established without discrimination based on sex, and social security. Legislation should recognize these rights for domestic workers and ensure adequate means of monitoring domestic work, including through labour inspection, and the ability of domestic workers to complain and seek remedies for violations;

(g) *Self-employed workers*: Where unable to earn a sufficient income, such workers should have access to appropriate support measures. Self-employed female workers should benefit from maternity insurance on an equal basis with other workers.<sup>42</sup> Legislation on occupational health and safety should cover self-employed workers, requiring them to undertake appropriate training programmes, and be aimed at raising their awareness on the importance of rest, leisure and limitations on working time. Small-scale farmers who rely on unpaid family labour to compensate for difficult working conditions deserve particular attention;

(h) *Agricultural workers*: Agricultural workers often face severe socioeconomic disadvantages, forced labour, income insecurity and lack of access to basic services. At times, they are formally excluded from industrial relations and social security systems. Women agricultural workers, particularly on family farms, are often not recognized as workers and therefore not entitled to wages and social protection, to join agricultural cooperatives and to benefit from loans, credits and other measures to improve working conditions. States parties should enact laws and policies to ensure that agricultural workers enjoy treatment no less favourable than that enjoyed by other categories of workers;

(i) *Refugee workers*: Because of their often precarious status, refugee workers remain vulnerable to exploitation, discrimination and abuse in the workplace, may be less well paid than nationals, and have longer working hours and more dangerous working conditions. States parties should enact legislation enabling refugees to work and under conditions no less favourable than for nationals;

(j) *Unpaid workers*: Women work in activities that are significant for their households and the national economy, and they spend twice as much time as men in unpaid work. Unpaid workers, such as workers in the home or in family enterprises, volunteer workers and unpaid interns, have remained beyond the coverage of ILO conventions and

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<sup>41</sup> See ILO Domestic Workers Convention, 2011 (No. 189), arts. 5, 6, 7, 10, 11, 13, 14, 16 and 17.

<sup>42</sup> See Committee on the Elimination of Discrimination against Women, communication No. 36/2012, *Blok et al. v. The Netherlands*, views adopted on 17 February 2014.

national legislation. They have a right to just and favourable conditions of work and should be protected by laws and policies on occupational safety and health, rest and leisure, and reasonable limitations on working hours, as well as social security.

#### **Freedom from harassment, including sexual harassment**

48. All workers should be free from physical and mental harassment, including sexual harassment. Legislation, such as anti-discrimination laws, the penal code and labour legislation, should define harassment broadly, with explicit reference to sexual and other forms of harassment, such as on the basis of sex, disability, race, sexual orientation, gender identity and intersex status. A specific definition of sexual harassment in the workplace is appropriate, and legislation should criminalize and punish sexual harassment as appropriate. A national policy to be applied in the workplace, in both the public and private sectors, should include at least the following elements: (a) explicit coverage of harassment by and against any worker; (b) prohibition of certain acts that constitute harassment, including sexual harassment; (c) identification of specific duties of employers, managers, supervisors and workers to prevent and, where relevant, resolve and remedy harassment cases; (d) access to justice for victims, including through free legal aid; (e) compulsory training for all staff, including for managers and supervisors; (f) protection of victims, including the provision of focal points to assist them, as well as avenues of complaint and redress; (g) explicit prohibition of reprisals; (h) procedures for notification and reporting to a central public authority of claims of sexual harassment and their resolution; (i) provision of a clearly visible workplace-specific policy, developed in consultation with workers, employers and their representative organizations, and other relevant stakeholders such as civil society organizations.

49. Human rights defenders should be able to contribute to the full realization of Covenant rights for all, free from any form of harassment. States parties should respect, protect and promote the work of human rights defenders and other civil society actors towards the realization of the right to just and favourable conditions of work, including by facilitating access to information and enabling the exercise of their rights to freedom of expression, association, assembly and public participation.

### **III. Obligations**

#### **A. General obligations**

50. States parties must comply with their core obligations and take deliberate, concrete and targeted steps towards the progressive realization of the right to just and favourable conditions of work, using maximum available resources.<sup>43</sup> In addition to legislation as an indispensable step, States should also ensure the provision of judicial and other effective remedies that include, but are not limited to, administrative, financial, educational and social measures.

51. States parties must move as expeditiously and effectively as possible towards the full implementation of the right to just and favourable conditions of work, with a level of flexibility to choose the appropriate means. Although non-State actors, such as employer and worker organizations, also have a responsibility to secure just and favourable conditions of work, particularly through collective agreements, States parties must

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<sup>43</sup> Committee on Economic, Social and Cultural Rights general comment No. 3 (1990) on the nature of States parties' obligations.

effectively regulate and enforce that right, and sanction non-compliance by public and private employers.

52. State parties should avoid taking any deliberately retrogressive measure without careful consideration and justification. When a State party seeks to introduce retrogressive measures, for example, in response to an economic crisis, it has to demonstrate that such measures are temporary, necessary and non-discriminatory, and that they respect at least its core obligations.<sup>44</sup> A State party may never justify retrogressive measures in relation to aspects of the right to just and favourable conditions of work that are subject to immediate or core obligations. States parties facing considerable difficulties in achieving progressive realization of that right due to a lack of national resources have an obligation to seek international cooperation and assistance.

53. States parties must guarantee that the right to just and favourable conditions of work is exercised without discrimination of any kind. Specifically, they have an obligation to guarantee that women enjoy conditions of work not inferior to those of men and receive equal pay for work of equal value, which requires the immediate elimination of formal and substantive discrimination.<sup>45</sup> States parties must also combat all forms of unequal treatment arising from precarious employment relationships.

54. In order to ensure accountability, States parties should establish a functioning system of labour inspectorates, with the involvement of social partners, to monitor all aspects of the right to just and favourable conditions of work for all workers, including workers in the informal economy, domestic workers and agricultural workers; to provide advice to workers and employers; and to raise any abuses with competent authorities. Labour inspectorates should be independent and adequately resourced; staffed with trained professionals; able to rely on specialists and medical experts; and have the authority to enter workplaces freely and without prior notice, make recommendations to prevent or remedy problems and facilitate access to justice for victims. Penalties should apply for non-compliance with their recommendations. Labour inspectorates should focus on monitoring the rights of workers and not be used for other purposes, such as checking the migration status of workers.

55. States parties should identify indicators and benchmarks to monitor the implementation of the right to just and favourable conditions of work. Such indicators and benchmarks should address the different elements of the right to just and favourable conditions of work, be disaggregated by sex and other relevant grounds such as age, disability, nationality and urban/rural location, and cover all persons under the territorial jurisdiction of the State party or under its control. States parties should define the indicators that are most relevant to national implementation of the right, such as the incidence of occupational accidents; the ratio of women's wages to men's wages; the proportion of women and other underrepresented individuals in high-level positions; the proportion of workers offered continuing job training; the number of complaints of harassment received and resolved; the minimum standards for rest, leisure, hours of work and paid annual leave; and the uptake of measures to reconcile professional and family life by women and men. In selecting indicators, the Committee invites States parties to take into account available guidance, including the Office of the United Nations High Commissioner for Human Rights

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<sup>44</sup> Letter of the Chair of the Committee to States parties on austerity measures, May 2012.

<sup>45</sup> See Committee on Economic, Social and Cultural Rights general comment No. 20, para. 8.

(OHCHR) lists of illustrative indicators with respect to articles 6 and 7 of the Covenant and ILO indicators.<sup>46</sup>

56. The Committee underlines the importance of consultation in formulating, implementing, reviewing and monitoring laws and policies related to the right to just and favourable conditions of work, not only with traditional social partners such as workers and employers and their representative organizations, but also with other relevant organizations, such as those representing persons with disabilities, younger and older persons, women, workers in the informal economy, migrants and lesbian, gay, bisexual, transgender and intersex persons, as well as representatives of ethnic groups and indigenous communities.

57. Any person who has experienced a violation of the right to just and favourable conditions of work should have access to effective judicial or other appropriate remedies, including adequate reparation, restitution, compensation, satisfaction or guarantees of non-repetition. Access to remedy should not be denied on the grounds that the affected person is an irregular migrant. Not only courts, but also national human rights institutions, labour inspectorates and other relevant mechanisms, should have authority to address such violations. States should review and, if necessary, reform their legislation and codes of procedure to ensure access to remedies, as well as procedural fairness. Legal assistance for obtaining remedies should be available and it should be free for those who are unable to pay.

## **B. Specific legal obligations**

58. The right to just and favourable conditions of work imposes three levels of obligations on States parties. First, State parties have an obligation to respect the right by refraining from interfering directly or indirectly with its enjoyment. This is particularly important when the State is the employer, including in State-owned or State-controlled enterprises. For example, States parties should not introduce salary scales that discriminate, directly or indirectly, against female workers, or maintain a promotion system in the public sector that favours, directly or indirectly, the overrepresented gender at higher levels. States parties should take measures to prevent and remedy occupational accidents and disease resulting from their acts or omissions. States parties should also respect collective agreements aimed at introducing and maintaining just and favourable conditions of work and review legislation, including corporate laws and regulations, to ensure that it does not constrain that right.<sup>47</sup>

59. The obligation to protect requires States parties to take measures to ensure that third parties, such as private sector employers and enterprises, do not interfere with the enjoyment of the right to just and favourable conditions of work and comply with their obligations. This includes taking steps to prevent, investigate, punish and redress abuse through effective laws and policies and adjudication. For example, States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, such as a national occupational safety and health policy, or legislation on minimum wage and minimum standards for working conditions, are adequate and effectively enforced.<sup>48</sup> States parties should impose sanctions and appropriate penalties on third parties, including adequate reparation, criminal penalties, pecuniary measures such as damages, and

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<sup>46</sup> OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (Geneva, 2012) (HR/PUB/12/5); see p. 95 of that report for an illustrative list of indicators relating to articles 6 and 7 of the Covenant. See also ILO Labour Statistics Convention, 1985 (No. 160).

<sup>47</sup> See Guiding Principles on Business and Human Rights, principle 3 (b).

<sup>48</sup> *Ibid.*, principle 3.

administrative measures, in the event of violation of any of the elements of the right. They should also refrain from procuring goods and services from individuals and enterprises that abuse the right. State parties should ensure that the mandates of labour inspectorates and other investigation and protection mechanisms cover conditions of work in the private sector and provide guidance to employers and enterprises. Measures to protect should also cover the informal sector. Certain workers, such as domestic workers, may require specific measures.

60. The obligation *to fulfil* requires States parties to adopt the measures necessary to ensure the full realization of the right to just and favourable conditions of work. This includes introducing measures to facilitate, promote and provide that right, including through collective bargaining and social dialogue.

61. In order to facilitate the right to just and favourable conditions of work, States parties should adopt positive measures to assist workers by according sufficient recognition of the right through laws, policies and regulations, for example, on non-discrimination, a non-derogable minimum wage, occupational safety and health, compulsory insurance coverage, minimum standards for rest, leisure, limitations on working hours, paid annual and other leave and public holidays. States parties should also introduce quotas or other temporary special measures to enable women and other members of groups that have experienced discrimination to reach high-level posts and provide incentives for the private sector to do so.

62. To help assess the enjoyment of the right to just and favourable conditions of work, States parties should establish obligatory notification schemes in the event of occupational accidents and disease, as well as mechanisms to assess systematically the level of the minimum wage, fair wages and the gender pay gap between men and women within organizations in the public and private sectors, including in high-level posts. States parties should also periodically review the impact of laws and policies, in consultation with workers and employers, with a view to updating standards in the light of practice. For example, the national policy on occupational safety and health should include a built-in periodic review mechanism. States parties should promote the extension of protective regimes to sectors at risk; introduce schemes that allow for coverage of informal workers, coupled with measures to regularize the informal economy; create adequate dialogue mechanisms to raise pertinent issues; and introduce incentives to overcome the gender pay gap, including through initiatives to alleviate the burden of reproductive work on women, for example, by promoting access to goods and services, such as day-care facilities and non-transferable parental leave for men.

63. In order to promote the right to just and favourable conditions of work, State parties should take steps to ensure appropriate education, information and public awareness. With a view to creating equal opportunities for workers to advance in both the private and public sectors, States parties should put in place training programmes and information campaigns, also targeting employers, in relevant languages and accessible formats for persons with disabilities and illiterate workers. Attention should be paid to the need for gender-sensitive training on the occupational health and safety of workers.

64. States parties must also provide aspects of the right to just and favourable conditions of work when workers are unable to realize the right themselves. They have a role in creating an enabling labour market environment and should, for example, adapt the workplace and equipment for persons with disabilities in the public sector and provide incentives for the private sector to do so. States could establish non-contributory social security programmes for certain workers, such as workers in the informal economy, to provide benefits and protection against accidents and disease at work.

## **C. Core obligations**

65. States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the right to just and favourable conditions of work. Specifically, this requires States parties to:

(a) Guarantee through law the exercise of the right without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, age, sexual orientation, gender identity, intersex status, health, nationality or any other status;

(b) Put in place a comprehensive system to combat gender discrimination at work, including with regard to remuneration;

(c) Establish in legislation and in consultation with workers and employers, their representative organizations and other relevant partners, minimum wages that are non-discriminatory and non-derogable, fixed by taking into consideration relevant economic factors and indexed to the cost of living so as to ensure a decent living for workers and their families;

(d) Adopt and implement a comprehensive national policy on occupational safety and health;

(e) Define and prohibit harassment, including sexual harassment, at work through law, ensure appropriate complaints procedures and mechanisms and establish criminal sanctions for sexual harassment;

(f) Introduce and enforce minimum standards in relation to rest, leisure, reasonable limitation of working hours, paid leave and public holidays.

## **D. International assistance and cooperation**

66. All States must take steps individually and through international assistance and cooperation, especially economic and technical, with a view to achieving progressively the full realization of the right to just and favourable conditions of work. This is particularly incumbent upon those States which are in a position to assist others in this regard. International assistance and cooperation is a means of transferring knowledge and technology and a tool for States to maximize available resources for the full realization of Covenant rights.

67. When a State party is not in a position to meet its obligations to realize the right to just and favourable conditions of work, it must seek international assistance. Depending on the availability of resources, States parties should respond to such requests by providing economic and technical assistance and technology transfer and by promoting transnational dialogue between employer and worker organizations, among other measures. Such assistance should be sustainable, culturally appropriate and provided in a manner consistent with human rights standards. Economically developed States parties have a special responsibility for, and interest in, assisting developing countries in this regard.

68. States parties should avail themselves of the technical assistance and cooperation of international organizations, in particular ILO. When preparing reports, States parties should use the extensive information and advisory services provided by ILO for data collection and disaggregation.

69. States parties must refrain from acts or omissions that interfere, either directly or indirectly, with the realization of the right to just and favourable conditions of work in other countries. This is particularly relevant when a State party owns or controls an enterprise or

provides substantial support and services to an enterprise operating in another State party.<sup>49</sup> To this end, the State party should respect relevant host-country legislation that complies with the Covenant. When the home country has stronger legislation, the State party should seek to maintain similar minimum standards in the host country as much as practicable. State parties should also require respect for the right to just and favourable conditions of work by individuals and enterprises based extraterritorially with which they conduct commercial transactions.<sup>50</sup>

70. States parties should take measures, including legislative measures, to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right to just and favourable conditions of work throughout their operations extraterritorially.<sup>51</sup> This responsibility is particularly important in States with advanced labour law systems, as home-country enterprises can help to improve standards for working conditions in host countries. Similarly, in conflict and post-conflict situations, States parties can have an important regulatory and enforcement role and support individuals and enterprises in identifying, preventing and mitigating risks to just and favourable conditions of work through their operations.<sup>52</sup> States parties should introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extraterritorially and that victims have access to remedy. States parties should also provide guidance to employers and enterprises on how to respect the right extraterritorially.<sup>53</sup>

71. States parties acting as members of relevant international organizations should also respect the right to just and favourable conditions of work. States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank and regional development banks, should take steps to ensure that the right is taken into account in their lending policies, credit agreements and other international measures. They should also ensure that the policies and practices of international and regional financial institutions, in particular those concerning structural and/or fiscal adjustment, promote and do not interfere with the right.

72. States parties should ensure that the right to just and favourable conditions of work is given due attention in the conclusion and implementation of international agreements, including in bilateral, regional and multilateral trade and investment agreements. Similarly, States parties should ensure that other international agreements do not negatively affect the right to just and favourable conditions of work, for example, by restricting the actions that other States parties could take to implement the right. States parties that have not done so should consider ratifying core human rights treaties and relevant ILO conventions.

73. States parties should cooperate so as to protect the rights of their nationals working in other States parties, including through bilateral agreements with host countries and the sharing of recruitment practices. This is particularly important to avoid abuse of migrant workers, including domestic workers, and to combat trafficking in persons. Similarly, States parties should seek international cooperation to protect the rights of migrant workers who are employed by enterprises registered in other States parties so as to enable such workers to enjoy just and favourable conditions of work.

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<sup>49</sup> Ibid., principle 4.

<sup>50</sup> Ibid., principle 6.

<sup>51</sup> Ibid., principle 2.

<sup>52</sup> Ibid., principle 7 (a).

<sup>53</sup> Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011).



## **E. Obligations of non-State actors**

74. While only States are parties to the Covenant, business enterprises, trade unions and all members of society have responsibilities to realize the right to just and favourable conditions of work. This is particularly important in the case of occupational safety and health, given that the employer's responsibility for the safety and health of workers is a basic principle of labour law, intrinsically related to the employment contract, but it also applies to other elements of the right to just and favourable conditions of work.

75. Business enterprises, irrespective of size, sector, ownership and structure,<sup>54</sup> should comply with laws that are consistent with the Covenant and have a responsibility to respect the right to just and favourable conditions of work,<sup>55</sup> avoiding any infringements and addressing any abuse of the right as a result of their actions. In situations in which a business enterprise has caused or contributed to adverse impacts, the enterprise should remedy the damage or cooperate in its remediation through legitimate processes that meet recognized standards of due process.<sup>56</sup>

76. The role of United Nations agencies and programmes, in particular ILO, is also important. In conformity with articles 22 and 23 of the Covenant, ILO and other United Nations specialized agencies, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies, as well as the United Nations Secretariat, including OHCHR, should cooperate effectively with States parties in the implementation of the right to just and favourable conditions of work. When examining State party reports, the Committee will consider the effects of any request for assistance by the State party concerning the enjoyment of the right, as well as the response given.

## **IV. Violations and remedies**

77. States parties must demonstrate that they have taken all steps necessary towards the realization of the right within their maximum available resources, that the right is enjoyed without discrimination and that women enjoy conditions of work not inferior to men, as well as equal pay for equal work and for work of equal value. A failure to take such steps amounts to a violation of the Covenant. In assessing whether States parties have complied with their obligation to take such steps, the Committee examines whether steps taken are reasonable and proportionate and whether they comply with human rights standards and democratic principles.

78. Violations of the right to just and favourable conditions of work can occur through acts of commission, which means direct actions of States parties. Adoption of labour migration policies that increase the vulnerability of migrant workers to exploitation, failure to prevent unfair dismissal from work of pregnant workers in public service, and introduction of deliberately retrogressive measures that are incompatible with core obligations are all examples of such violations.

79. Violations can also occur through acts of omission, which means the failure by a State party to take reasonable steps to fully realize the right for everyone, for example by failing to enforce relevant laws and implement adequate policies, or to regulate the activities of individuals and groups to prevent them from violating the right, or to take into

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<sup>54</sup> See Guiding Principles on Business and Human Rights, principle 14.

<sup>55</sup> *Ibid.*, principles 11, 12 and 23.

<sup>56</sup> *Ibid.*, principle 22.

account its Covenant obligations when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

80. States parties must put into place an adequate monitoring and accountability framework by ensuring access to justice or to other effective remedies.

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**Committee on Economic, Social and Cultural Rights****General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities\*****I. Introduction**

1. Businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and — through private investment — to development. However, the Committee on Economic, Social and Cultural Rights has been regularly presented with situations in which, as a result of States' failure to ensure compliance, under their jurisdiction, with internationally recognized human rights norms and standards, corporate activities have negatively affected economic, social and cultural rights. The present general comment seeks to clarify the duties of States parties to the International Covenant on Economic, Social and Cultural Rights in such situations, with a view to preventing and addressing the adverse impacts of business activities on human rights.

2. The Committee has previously considered the growing impact of business activities on the enjoyment of specific Covenant rights relating to health,<sup>1</sup> housing,<sup>2</sup> food,<sup>3</sup> water,<sup>4</sup> social security,<sup>5</sup> the right to work,<sup>6</sup> the right to just and favourable conditions of work<sup>7</sup> and the right to form and join trade unions.<sup>8</sup> In addition, the Committee has addressed the issue in concluding observations<sup>9</sup> on States parties' reports, and in its first decision on an individual communication.<sup>10</sup> In 2011, it adopted a statement on State obligations related to corporate responsibilities in the context of the Covenant rights.<sup>11</sup> The present general comment should be read together with these earlier contributions. It also takes into account

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\* Adopted by the Committee on Economic, Social and Cultural Rights at its sixty-first session (29 May-23 June 2017).

<sup>1</sup> See the Committee's general comment No. 14 (2000) on the right to the highest attainable standard of health, paras. 26 and 35.

<sup>2</sup> See the Committee's general comment No. 4 (1991) on the right to adequate housing, para. 14.

<sup>3</sup> See the Committee's general comment No. 12 (1999) on the right to adequate food, paras. 19 and 20.

<sup>4</sup> See the Committee's general comment No. 15 (2002) on the right to water, para. 49.

<sup>5</sup> See the Committee's general comment No. 19 (2007) on the right to social security, paras. 45, 46 and 71.

<sup>6</sup> See the Committee's general comment No. 18 (2005) on the right to work, para. 52.

<sup>7</sup> See the Committee's general comment No. 23 (2016) on the right to just and favourable conditions of work, paras. 74 and 75.

<sup>8</sup> See E/C.12/AZE/CO/3, para. 15.

<sup>9</sup> See E/C.12/CAN/CO/6, paras. 15 and 16; E/C.12/VNM/CO/2-4, paras. 22 and 29; and E/C.12/DEU/CO/5, paras. 9-11.

<sup>10</sup> Communication No. 2/2014, *I.D.G. v. Spain*, Views adopted on 17 June 2015.

<sup>11</sup> See E/C.12/2011/1, para. 7.



advances within the International Labour Organization<sup>12</sup> and within regional organizations such as the Council of Europe.<sup>13</sup> In adopting the present general comment, the Committee has considered the Guiding Principles on Business and Human Rights endorsed by the Human Rights Council in 2011,<sup>14</sup> as well as the contributions made to this issue by human rights treaty bodies and various special procedures.<sup>15</sup>

## II. Context and scope

3. For the purposes of the present general comment, business activities include all activities of business entities, whether they operate transnationally or their activities are purely domestic, whether they are fully privately owned or State-owned, and regardless of their size, sector, location, ownership and structure.

4. In certain jurisdictions, individuals enjoy direct recourse against business entities for violations of economic, social and cultural rights, whether in order to impose on such private entities (negative) duties to refrain from certain courses of conduct or to impose (positive) duties to adopt certain measures or to contribute to the fulfilment of such rights.<sup>16</sup> There are also a large number of domestic laws designed to protect specific economic, social and cultural rights, that apply directly to business entities, such as in the areas of non-discrimination, health-care provision, education, the environment, employment relations and consumer safety.

5. In addition, under international standards, business entities are expected to respect Covenant rights regardless of whether domestic laws exist or are fully enforced in practice.<sup>17</sup> The present general comment therefore also seeks to assist the corporate sector in discharging their human rights obligations and assuming their responsibilities, thus mitigating any reputational risks that may be associated with violations of Covenant rights within their sphere of influence.

6. The present general comment could also assist workers' organizations and employers in the context of collective bargaining. A large number of States parties require workplace procedures for the examination of grievances brought by workers, individually or collectively, without threat of reprisal.<sup>18</sup> Social dialogue and the availability of grievance mechanisms for workers could be more systematically relied upon, particularly for the implementation of articles 6 and 7 of the Covenant.

## III. Obligations of States parties under the Covenant

### A. Obligations of non-discrimination

7. The Committee has previously underlined that discrimination in the exercise of economic, social and cultural rights is frequently found in private spheres, including in

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<sup>12</sup> The International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, initially adopted in 1977 and last revised in 2017, encourages positive contributions by enterprises to society for implementation of the principles underlying international labour standards.

<sup>13</sup> See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, on human rights and business, adopted on 2 March 2016 at the 1249th meeting of the Ministers' Deputies.

<sup>14</sup> See A/HRC/17/31, endorsed by the Human Rights Council in its resolution 17/4.

<sup>15</sup> See A/HRC/4/35/Add.1.

<sup>16</sup> See, for example, the Constitutional Court of South Africa, *Daniels v. Scribante and others*, case CCT 50/16, judgment of 11 May 2017, paras. 37-39 (leading judgment by J. Madlanga) (positive duties imposed on the owner to ensure the right to security of tenure in conditions that comply with the requirements of human dignity).

<sup>17</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, principle 11 and commentary.

<sup>18</sup> See the ILO Examination of Grievances Recommendation, 1967 (No. 130).

workplaces and the labour market<sup>19</sup> and in the housing and lending sectors.<sup>20</sup> Under articles 2 and 3 of the Covenant, States parties have the obligation to guarantee the enjoyment of Covenant rights to all without discrimination.<sup>21</sup> The requirement to eliminate formal as well as substantive forms of discrimination<sup>22</sup> includes a duty to prohibit discrimination by non-State entities in the exercise of economic, social and cultural rights.

8. Among the groups that are often disproportionately affected by the adverse impact of business activities are women, children, indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources,<sup>23</sup> peasants, fisherfolk and other people working in rural areas, and ethnic or religious minorities where these minorities are politically disempowered. Persons with disabilities are also often disproportionately affected by the negative impacts of business activities, in particular because they face particular barriers in accessing accountability and remedy mechanisms. As noted by the Committee on previous occasions, asylum seekers and undocumented migrants are at particular risk of facing discrimination in the enjoyment of Covenant rights due to their precarious situation, and under article 7 of the Covenant, migrant workers are particularly vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments.<sup>24</sup>

9. Certain segments of the population face a greater risk of suffering intersectional and multiple discrimination.<sup>25</sup> For instance, investment-linked evictions and displacements often result in physical and sexual violence against, and inadequate compensation and additional burdens related to resettlement for, women and girls.<sup>26</sup> In the course of such investment-linked evictions and displacements, indigenous women and girls face discrimination both due to their gender and because they identify as indigenous people. In addition, women are overrepresented in the informal economy and are less likely to enjoy labour-related and social security protections.<sup>27</sup> Furthermore, despite some improvement, women continue to be underrepresented in corporate decision-making processes worldwide.<sup>28</sup> The Committee therefore recommends that States parties address the specific impacts of business activities on women and girls, including indigenous women and girls, and incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights, including by consulting the Guidance on National Action Plans on Business and Human Rights.<sup>29</sup> States parties should also take appropriate steps, including through temporary special measures, to improve women's representation in the labour market, including at the upper echelons of the corporate hierarchy.

<sup>19</sup> See, for example, the Committee's general comment No. 18, paras. 13 and 14; the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 32; the Committee's general comment No. 6 (1995) on the economic, social and cultural rights of older persons, para. 22; and the Committee's general comment No. 4, para. 8 (e).

<sup>20</sup> See the Committee's general comment No. 4, para. 17; and general comment No. 20, para. 11.

<sup>21</sup> See the Committee's general comment No. 20, paras. 7 and 8.

<sup>22</sup> *Ibid.*, paras. 8 and 11.

<sup>23</sup> See the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, annex, art. 32 (2)).

<sup>24</sup> See E/C.12/2017/1 for the Committee's statement on the duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights; and the Committee's general comment No. 23, para. 47 (e).

<sup>25</sup> See the Committee's general comment No. 20, para. 17.

<sup>26</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) and United Nations Human Settlements Programme (UN-Habitat), *Forced Evictions*, Fact Sheet No. 25/Rev.1 (2014), p. 16.

<sup>27</sup> See A/HRC/26/39, paras. 48-50. See also the guidance to States on how to adopt measures to promote workers' rights and social protection in the informal economy while encouraging a transition to the formal economy, provided in the ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

<sup>28</sup> See A/HRC/26/39, paras. 57-62.

<sup>29</sup> By the Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group on Business and Human Rights) (November 2016).

## B. Obligations to respect, to protect and to fulfil

10. The Covenant establishes specific obligations of States parties at three levels — to respect, to protect and to fulfil. These obligations apply both with respect to situations on the State's national territory, and outside the national territory in situations over which States parties may exercise control. The extraterritorial components of the obligations are addressed separately in subsection III. C below. That section clarifies the content of States' obligations, focusing on their duties to protect, which are the most relevant in the context of business activities.

11. The present general comment addresses the States parties to the Covenant, and in that context it only deals with the conduct of private actors — including business entities — indirectly. In accordance with international law, however, States parties may be held directly responsible for the action or inaction of business entities: (a) if the entity concerned is in fact acting on that State party's instructions or is under its control or direction in carrying out the particular conduct at issue,<sup>30</sup> as may be the case in the context of public contracts;<sup>31</sup> (b) when a business entity is empowered under the State party's legislation to exercise elements of governmental authority<sup>32</sup> or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities;<sup>33</sup> or (c) if and to the extent that the State party acknowledges and adopts the conduct as its own.<sup>34</sup>

### 1. Obligation to respect

12. The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects.<sup>35</sup> Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk.<sup>36</sup> States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.<sup>37</sup>

13. States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist,<sup>38</sup> as required under the principle of the binding character of treaties.<sup>39</sup> The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of

<sup>30</sup> See A/56/10 for articles on responsibility of States for internationally wrongful acts, with commentaries adopted by the International Law Commission, art. 8. See also General Assembly resolutions 56/83, 59/35, 62/61, 65/19 and 68/104.

<sup>31</sup> In particular, the responsibility of the State may be engaged if it fails to include labour clauses in public contracts to ensure the appropriate protection of workers employed by private contractors awarded such contracts. In this regard, States are referred to the ILO Labour Clauses (Public Contracts) Convention, 1949 (No. 94) and the ILO Labour Clauses (Public Contracts) Recommendation, 1949 (No. 84).

<sup>32</sup> Articles on responsibility of States for internationally wrongful acts, art. 5.

<sup>33</sup> *Ibid.*, art. 9.

<sup>34</sup> *Ibid.*, art. 11.

<sup>35</sup> See the Committee's general comment No. 7 (1997) on forced evictions, paras. 7 and 18; and OHCHR and UN-Habitat, *Forced Evictions*, Fact Sheet No. 25/Rev.1, pp. 28 and 29. See also, for example, A/HRC/25/54/Add.1, paras. 55 and 59-63.

<sup>36</sup> See the Committee's general comment No. 21 (2009) on the right of everyone to take part in cultural life, para. 36. See also the United Nations Declaration on the Rights of Indigenous Peoples, art. 26.

<sup>37</sup> See the United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 19, 28, 29 and 32.

<sup>38</sup> See A/HRC/19/59/Add.5. See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 23.

<sup>39</sup> See the Vienna Convention on the Law of Treaties, arts. 26 and 30 (4) (b).

any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations.<sup>40</sup> States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.

## 2. Obligation to protect

14. The obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that States parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.

15. States parties should consider imposing criminal or administrative sanctions and penalties, as appropriate, where business activities result in abuses of Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur; enable civil suits and other effective means of claiming reparations by victims of rights violations against corporate perpetrators, in particular by lowering the costs to victims and by allowing forms of collective redress; revoke business licences and subsidies, if and to the extent necessary, from offenders; and revise relevant tax codes, public procurement contracts,<sup>41</sup> export credits and other forms of State support, privileges and advantages in case of human rights violations, thus aligning business incentives with human rights responsibilities. States parties should regularly review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems.<sup>42</sup>

16. The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.<sup>43</sup> States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners.

17. States parties should ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments.<sup>44</sup> In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before

<sup>40</sup> Inter-American Court of Human Rights, *Sawhoyamaya Indigenous Community v. Paraguay* (judgment of 29 March 2006, Series C No. 146), para. 140.

<sup>41</sup> See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labour Organization at its 105th session, para. 16 (c).

<sup>42</sup> Guiding Principles on Business and Human Rights, principle 17 (c). See A/HRC/32/19.Add.1, para. 5, for the model terms of reference for a review of the coverage and effectiveness of laws relevant to business-related human rights abuses; and A/HRC/32/19, annex, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse. See also Human Rights Council resolution 32/10.

<sup>43</sup> Guiding Principles on Business and Human Rights, principles 15 and 17.

<sup>44</sup> See A/68/279, para. 31; A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 15; A/HRC/33/42; and A/66/288, paras. 92-102.

the commencement of activities.<sup>45</sup> Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.<sup>46</sup>

18. States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance through lowering the criteria for approving new medicines,<sup>47</sup> by failing to incorporate a requirement linked to reasonable accommodation of persons with disabilities in public contracts, by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of Covenant rights, by exempting certain projects or certain geographical areas from the application of laws that protect Covenant rights, or by failing to regulate the real estate market and the financial actors operating on that market so as to ensure access to affordable and adequate housing for all.<sup>48</sup> Such violations are facilitated where insufficient safeguards exist to address corruption of public officials or private-to-private corruption, or where, as a result of corruption of judges, human rights abuses are left unremedied.

19. The obligation to protect sometimes necessitates direct regulation and intervention. States parties should consider measures such as restricting marketing and advertising of certain goods and services in order to protect public health,<sup>49</sup> such as of tobacco products, in line with the Framework Convention on Tobacco Control,<sup>50</sup> and of breast-milk substitutes, in accordance with the 1981 International Code of Marketing of Breast-milk Substitutes and subsequent resolutions of the World Health Assembly;<sup>51</sup> combating gender role stereotyping and discrimination;<sup>52</sup> exercising rent control in the private housing market as required for the protection of everyone's right to adequate housing;<sup>53</sup> establishing a minimum wage consistent with a living wage and a fair remuneration;<sup>54</sup> regulating other business activities concerning the Covenant rights to education, employment and reproductive health, in order to combat gender discrimination effectively;<sup>55</sup> and gradually eliminating informal or "non-standard" (i.e. precarious) forms of employment, which often result in denying the workers concerned the protection of labour laws and social security.

20. Corruption constitutes one of the major obstacles to the effective promotion and protection of human rights, particularly as regards the activities of businesses.<sup>56</sup> It also undermines a State's ability to mobilize resources for the delivery of services essential for the realization of economic, social and cultural rights. It leads to discriminatory access to public services in favour of those able to influence authorities, including by offering bribes

<sup>45</sup> A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 16; and the United Nations Declaration on the Rights of Indigenous Peoples, art. 19.

<sup>46</sup> See A/66/288, para. 102.

<sup>47</sup> See A/63/263 and A/HRC/11/12.

<sup>48</sup> See A/HRC/34/51, paras. 62-66.

<sup>49</sup> See the Convention on the Rights of the Child; Committee on the Rights of the Child, general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 14, 19, 20, 56 and 57; World Health Organization, *Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2010); and World Health Organization, *A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children* (2012).

<sup>50</sup> Of the World Health Organization.

<sup>51</sup> See A/HRC/19/59, para. 16.

<sup>52</sup> See the Convention on the Elimination of All Forms of Discrimination against Women, art. 5.

<sup>53</sup> See the Committee's general comment No. 4, para. 8 (c).

<sup>54</sup> See the Committee's general comment No. 23, paras. 10-16 and 19-24.

<sup>55</sup> See the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, para. 13.

<sup>56</sup> See Human Rights Council resolution 23/9 and General Assembly resolution A/RES/69/199.



or resorting to political pressure. Therefore, whistle-blowers should be protected,<sup>57</sup> and specialized mechanisms against corruption should be established, their independence should be guaranteed and they should be sufficiently well resourced.

21. The increased role and impact of private actors in traditionally public sectors, such as the health or education sector, pose new challenges for States parties in complying with their obligations under the Covenant. Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called “public service obligations”: in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.<sup>58</sup> Similarly, private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information. For instance, where health practitioners are allowed to invoke conscientious objection to refuse to provide certain sexual and reproductive health services, including abortion, they should refer the women or girls seeking such services to another practitioner within reasonable geographical reach who is willing to provide such services.<sup>59</sup>

22. The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society, or where such institutions are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education.<sup>60</sup> Nor should privatization result in excluding certain groups that historically have been marginalized, such as persons with disabilities. States thus retain at all times the obligation to regulate private actors to ensure that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs. Since privatization of the delivery of goods or services essential to the enjoyment of Covenant rights may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services.

### 3. Obligation to fulfil

23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment. Discharging such duties may require the mobilization of resources by the State,

<sup>57</sup> See the conclusions attached to the resolution concerning decent work in global supply chains, adopted by the General Conference of the International Labour Organization at its 105th session, para. 16 (g).

<sup>58</sup> See, for example, Human Rights Council resolution 15/9.

<sup>59</sup> See the Committee’s general comment No. 22 (2016) on the right to sexual and reproductive health, paras. 14, 42, 43 and 60.

<sup>60</sup> See, for example, E/C.12/CHL/CO/4, para. 30; and A/69/402. Of course, important though it is, appropriate regulation of the providers of educational services should respect academic freedom and “the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions” (art. 13 (3) of the Covenant). As regards primary education, States parties must ensure not only that it is affordable, but that it is free, as required by arts. 13 (2) (a) and 14 of the Covenant.

including by enforcing progressive taxation schemes. It may require seeking business cooperation and support to implement the Covenant rights and comply with other human rights standards and principles.

24. This obligation also requires directing the efforts of business entities towards the fulfilment of Covenant rights. In designing a framework on intellectual property rights, for instance, that is consistent with the Universal Declaration of Human Rights and with the right to enjoy the benefits of scientific progress stipulated in article 15 of the Covenant, States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone's access to essential medicines necessary for the enjoyment of the right to health,<sup>61</sup> or to productive resources such as seeds, access to which is crucial to the right to food and to farmers' rights.<sup>62</sup> States parties should also recognize and protect the right of indigenous peoples to control the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.<sup>63</sup> In supporting research and development for new products and services, States parties should aim at the fulfilment of Covenant rights, for instance by supporting the development of universally designed goods, services, equipment and facilities, to advance the inclusion of persons with disabilities.

### C. Extraterritorial obligations

25. The past thirty years have witnessed a significant increase of activities of transnational corporations, growing investment and trade flows between countries, and the emergence of global supply chains. In addition, major development projects have increasingly involved private investments, often in the form of public-private partnerships between State agencies and foreign private investors. These developments give particular significance to the question of extraterritorial human rights obligations of States.

26. In its 2011 statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, the Committee reiterated that States parties' obligations under the Covenant did not stop at their territorial borders. States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.<sup>64</sup> The Committee has also addressed specific extraterritorial obligations of States parties concerning business activities in its previous general comments relating to the right to water,<sup>65</sup> the right to work,<sup>66</sup> the right to social security,<sup>67</sup> and the right to just and favourable conditions of work,<sup>68</sup> as well as in its examination of States' periodic reports.

27. Such extraterritorial obligations of States under the Covenant follow from the fact that the obligations of the Covenant are expressed without any restriction linked to territory or jurisdiction. Although article 14 of the Covenant does refer to compulsory primary education having to be provided by a State "in its metropolitan territory or other territories under its jurisdiction", such a reference is absent from the other provisions of the Covenant. Moreover, article 2 (1) refers to international assistance and cooperation as a means of fulfilling economic, social and cultural rights. It would be contradictory to such a reference to allow a State to remain passive where an actor domiciled in its territory and/or under its

<sup>61</sup> See also A/HRC/23/42, para. 3 (recognizing the obligation to provide essential medicines as an immediate obligation for all States parties).

<sup>62</sup> See A/64/170, paras. 5 and 7; and the International Treaty on Plant Genetic Resources for Food and Agriculture (resolution 3/2001, adopted on 3 November 2001, FAO Conference, thirty-first session), art. 9.

<sup>63</sup> See the United Nations Declaration on the Rights of Indigenous Peoples, arts. 24 and 31; and the Committee's general comment No. 21, para. 37.

<sup>64</sup> See E/C.12/2011/1, paras. 5 and 6.

<sup>65</sup> See the Committee's general comment No. 15, paras. 31 and 33.

<sup>66</sup> See the Committee's general comment No. 18, para. 52.

<sup>67</sup> See the Committee's general comment No. 19, para. 54.

<sup>68</sup> See the Committee's general comment No. 23, para. 70.

jurisdiction, and thus under its control or authority, harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused. Indeed, the Members of the United Nations have pledged “to take joint and separate action in cooperation with the Organization” to achieve the purposes set forth in article 55 of the Charter, including “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>69</sup> This duty is expressed without any territorial limitation, and should be taken into account when addressing the scope of States’ obligations under human rights treaties. Also in line with the Charter, the International Court of Justice has acknowledged the extraterritorial scope of core human rights treaties, focusing on their object and purpose, their legislative history and the lack of territorial limitation provisions in the text.<sup>70</sup> Customary international law also prohibits a State from allowing its territory to be used to cause damage on the territory of another State, a requirement that has gained particular relevance in international environmental law.<sup>71</sup> The Human Rights Council has confirmed that such prohibition extends to human rights law, when it endorsed the guiding principles on extreme poverty and human rights, in its resolution 21/11.<sup>72</sup>

28. Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory.<sup>73</sup> In that regard, the Committee also takes note of general comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, of the Committee on the Rights of the Child,<sup>74</sup> as well as of the positions adopted by other human rights treaty bodies.<sup>75</sup>

## 1. Extraterritorial obligation to respect

29. The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do

<sup>69</sup> Charter of the United Nations, Article 56.

<sup>70</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports (2004), paras. 109-112.

<sup>71</sup> *Trail Smelter case (United States of America v. Canada)*, Reports of International Arbitral Awards, vol. 3 (1941), p. 1965; International Court of Justice, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania) (Merits)*, I.C.J. Reports, vol. 4 (9 April 1949), para. 22; and International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports (8 July 1996), para. 29. See also A/61/10, draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, adopted at the fifty-eighth session of the International Law Commission, in 2006 (in particular principle 4, stipulating that “each State should take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control”). The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by a range of academics, research institutes and human rights non-governmental organizations in 2011, provide a restatement of the current state of international human rights law on this topic, contributing to its progressive development.

<sup>72</sup> Resolution 21/11 endorsed the final draft of the guiding principles on extreme poverty and human rights (see A/HRC/21/39), which provide, in para. 92, that “as part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices”.

<sup>73</sup> See the Committee’s general comment No. 12, para. 36; general comment No. 14, para. 39; or general comment No. 15, paras. 31-33; the Committee’s general comment No. 19, para. 54; general comment No. 20, para. 14; and general comment No. 23, paras. 69 and 70; and E/C.12/2011/1, para. 5.

<sup>74</sup> See paras. 43 and 44.

<sup>75</sup> See, for example, CERD/C/NOR/CO/19-20, para. 17; and CCPR/C/DEU/CO/6, para. 16.

not obstruct another State from complying with its obligations under the Covenant.<sup>76</sup> This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties,<sup>77</sup> as well as to judicial cooperation.

## 2. Extraterritorial obligation to protect

30. The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.

31. This obligation extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law.<sup>78</sup> Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national territory.<sup>79</sup> States parties may also utilize incentives short of the direct imposition of obligations, such as provisions in public contracts favouring business entities that have put in place robust and effective human rights due diligence mechanisms, in order to contribute to the protection of economic, social and cultural rights at home and abroad.

32. Whereas States parties would not normally be held directly internationally responsible for a violation of economic, social and cultural rights caused by a private entity's conduct (except in the three scenarios recalled in para. 11 of the present general comment), a State party would be in breach of its obligations under the Covenant where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation,<sup>80</sup> and even if the State had not foreseen that a violation would occur, provided such a violation was reasonably foreseeable.<sup>81</sup> For instance, considering the well-documented risks associated with the extractive industry, particular due diligence is required with respect to mining-related projects and oil development projects.<sup>82</sup>

33. In discharging their duty to protect, States parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights

<sup>76</sup> See the Committee's general comment No. 8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights; and articles on responsibility of States for internationally wrongful acts, art. 50 (countermeasures by a State or group of States in response to an internationally wrongful act by another State may not affect "obligations for the protection of fundamental human rights").

<sup>77</sup> See A/HRC/19/59/Add.5.

<sup>78</sup> See, for example, the Committee's general comment No. 14, para. 39; or general comment No. 15, paras. 31-33. The Maastricht Principles were the subject of explanatory commentaries; see Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171.

<sup>79</sup> See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 13.

<sup>80</sup> International Court of Justice, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (judgment of 26 February 2007), *I.C.J. Reports*, paras. 430 and 461.

<sup>81</sup> Articles on responsibility of States for internationally wrongful acts, art. 23, commentary.

<sup>82</sup> See A/HRC/8/5/Add.2.

by such subsidiaries and business partners, wherever they may be located.<sup>83</sup> The Committee underlines that, although the imposition of such due diligence obligations does have impacts on situations located outside these States' national territories since potential violations of Covenant rights in global supply chains or in multinational groups of companies should be prevented or addressed, this does not imply the exercise of extraterritorial jurisdiction by the States concerned. Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of Covenant rights.

34. In transnational cases, effective accountability and access to remedy requires international cooperation. The Committee refers in this regard to the recommendation included in the report on accountability and access to remedy for victims of business-related human rights abuse, prepared by the Office of the United Nations High Commissioner for Human Rights at the request of the Human Rights Council,<sup>84</sup> that States should "take steps, using the guidance" (annexed to that report) "to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies, with respect to both public and private law enforcement of domestic legal regimes".<sup>85</sup> The use of direct communication between law enforcement agencies for mutual assistance should be encouraged in order to provide for swifter action, particularly in the prosecution of criminal offences.

35. Improved international cooperation should reduce the risks of positive and negative conflicts of jurisdiction, which may result in legal uncertainty and in forum-shopping by litigants, or in an inability for victims to obtain redress. The Committee welcomes, in this regard, any efforts at the adoption of international instruments that could strengthen the duty of States to cooperate in order to improve accountability and access to remedies for victims of violations of Covenant rights in transnational cases. Inspiration can be found in instruments such as the International Labour Organization (ILO) Maritime Labour Convention, 2006, in force since 2013, which establishes a system of harmonized national legislation and inspections both by flag States and by port States upon complaints of seafarers on board ship when the ship comes into a foreign port; or in the ILO Domestic Workers Convention, 2011 (No. 189) and the ILO Domestic Workers Recommendation, 2011 (No. 201).

### 3. Extraterritorial obligation to fulfil

36. Article 2 (1) of the Covenant sets out the expectation that States parties will take collective action, including through international cooperation, in order to help fulfil the economic, social and cultural rights of persons outside of their national territories.<sup>86</sup>

37. Consistent with article 28 of the Universal Declaration of Human Rights,<sup>87</sup> this obligation to fulfil requires States parties to contribute to creating an international environment that enables the fulfilment of the Covenant rights. To that end, States parties must take the necessary steps in their legislation and policies, including diplomatic and foreign relations measures, to promote and help create such an environment. States parties should also encourage business actors whose conduct they are in a position to influence to ensure that they do not undermine the efforts of the States in which they operate to fully realize the Covenant rights — for instance by resorting to tax evasion or tax avoidance strategies in the countries concerned. To combat abusive tax practices by transnational

<sup>83</sup> Guiding Principles on Business and Human Rights, principle 13.

<sup>84</sup> See the Council's resolution 26/22.

<sup>85</sup> See A/HRC/32/19, paras. 24-28; and the annex to that report, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, paras. 9.1-9.7 and 10.1, and paras. 17.1-17.5 (for public law enforcement) and 18.1 and 18.2 (for private law enforcement).

<sup>86</sup> Olivier De Schutter and others, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights".

<sup>87</sup> See General Assembly resolution 217 (III) A.

corporations, States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.<sup>88</sup>

## IV. Remedies

38. In discharging their duty to protect, States parties should both create appropriate regulatory and policy frameworks and enforce such frameworks. Therefore, effective monitoring, investigation and accountability mechanisms must be put in place to ensure accountability and access to remedies, preferably judicial remedies, for those whose Covenant rights have been violated in the context of business activities. States parties should inform individuals and groups of their rights and the remedies accessible to them pertaining to the Covenant rights in the context of business activities, ensuring specifically that information and guidance, including human rights impact assessments, are accessible to indigenous peoples.<sup>89</sup> They also should provide businesses with relevant information, training and support, ensuring that they are made aware of the duties of the State under the Covenant.<sup>90</sup>

### A. General principles

39. States parties must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability.<sup>91</sup> This should preferably take the form of ensuring access to independent and impartial judicial bodies: the Committee has underlined that “other means [of ensuring accountability] used could be rendered ineffective if they are not reinforced or complemented by judicial remedies”.<sup>92</sup>

40. The guidelines on remedies for victims of gross violations of international human rights law and serious violations of international humanitarian law<sup>93</sup> provide useful indications as to the obligations that follow for States from the general obligation to provide access to effective remedies. In particular, States should: take all measures necessary to prevent rights violations; where such preventative measures fail, thoroughly investigate violations and take appropriate actions against alleged offenders; provide victims with effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and provide effective remedies to victims, including reparation.

41. It is imperative for the full realization of the Covenant rights that remedies be available, effective and expeditious. This requires that victims seeking redress must have prompt access to an independent public authority, which must have the power to determine

<sup>88</sup> See E/C.12/GBR/CO/6, paras. 16 and 17; and CEDAW/C/CHE/CO/4-5, para. 41.

<sup>89</sup> See the United Nations Declaration on the Rights of Indigenous Peoples, art. 14; A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, pp. 30 and 31; and A/68/279, para. 56 (d).

<sup>90</sup> Guiding Principles on Business and Human Rights, principle 8.

<sup>91</sup> See the Committee’s general comment No. 9 (1998) on the domestic application of the Covenant, para. 2.

<sup>92</sup> *Ibid.*, para. 3. See also *I.D.G. v. Spain*, paras. 14 and 15.

<sup>93</sup> See General Assembly resolution 60/147, for 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), art. 3 (a)-(d).

whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done. Reparation can be in the form of restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition,<sup>94</sup> and must take the views of those affected into account. To ensure non-repetition, an effective remedy may require improvements to legislation and policies that have proven ineffective in preventing the abuses.

42. Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct. Other barriers to effective access to remedies for victims of human rights violations by business entities include the difficulty of accessing information and evidence to substantiate claims, much of which is often in the hands of the corporate defendant; the unavailability of collective redress mechanisms where violations are widespread and diffuse; and the lack of legal aid and other funding arrangements to make claims financially viable.

43. Victims of transnational corporate abuses face specific obstacles in accessing effective remedies. In addition to the difficulty of proving the damage or establishing the causal link between the conduct of the defendant corporation located in one jurisdiction and the resulting violation in another, transnational litigation is often prohibitively expensive and time-consuming, and in the absence of strong mechanisms for mutual legal assistance, the collection of evidence and the execution in one State of judgments delivered in another State present specific challenges. In some jurisdictions, the *forum non conveniens* doctrine, according to which a court may decline to exercise jurisdiction if another forum is available to victims, may in effect constitute a barrier to the ability of victims residing in one State to seek redress before the courts of the State where the defendant business is domiciled. Practice shows that claims are often dismissed under this doctrine in favour of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction.

44. States parties have the duty to take necessary steps to address these challenges in order to prevent a denial of justice and ensure the right to effective remedy and reparation. This requires States parties to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings. The extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations.<sup>95</sup> The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies.

45. States parties should facilitate access to relevant information through mandatory disclosure laws and by introducing procedural rules allowing victims to obtain the disclosure of evidence held by the defendant. Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant.<sup>96</sup> The conditions under which the protection of trade secrets and other grounds for refusing disclosure may be invoked should be defined restrictively, without jeopardizing the right of all parties to a fair trial. Furthermore, States parties and their judicial and enforcement agencies have a duty to

<sup>94</sup> Ibid., part IX, "Reparation for harm suffered".

<sup>95</sup> See also recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, para. 34.

<sup>96</sup> As already noted by the Committee in the specific context of actions alleging discrimination: see the Committee's general comment No. 20, para. 40. See also A/HRC/32/19, annex, para. 12.5 (in relation to civil cases) and para. 1.7 (in relation to criminal and quasi-criminal cases).

cooperate with one another in order to promote information-sharing and transparency and prevent the denial of justice.

46. States parties should ensure that indigenous peoples have access to effective remedies, both judicial and non-judicial, for all infringements of their individual and collective rights. These remedies should be sensitive to indigenous cultures and accessible to indigenous peoples.<sup>97</sup>

47. The Committee recalls that all government branches and agencies of States parties, including the judiciary and law enforcement agencies, are bound by the obligations under the Covenant. States parties should ensure that the judiciary, in particular judges and lawyers, are well informed of the obligations under the Covenant linked to business activities, and that they can exercise their functions in complete independence.

48. Finally, the Committee draws the attention of States parties to the challenges facing human rights defenders.<sup>98</sup> The Committee has regularly come across accounts of threats and attacks aimed at those seeking to protect their own or others' Covenant rights, particularly in the context of extractive and development projects.<sup>99</sup> In addition, trade union leaders, leaders of peasant movements, indigenous leaders and anti-corruption activists are often subject to the risk of harassment. States parties should take all measures necessary to protect human rights advocates and their work. They should refrain from resorting to criminal prosecution to hinder their work, or from otherwise obstructing their work.

## B. Types of remedies

49. Ensuring corporate accountability for violations of Covenant rights requires reliance on various tools. The most serious violations of the Covenant should give rise to criminal liability of corporations and/or of the individuals responsible. Prosecuting authorities may have to be made aware of their role in upholding Covenant rights. Victims of violations of Covenant rights should have access to reparations where Covenant rights are at stake and whether or not criminal liability is engaged.<sup>100</sup>

50. States parties should also consider the use of administrative sanctions to discourage conduct by business entities that leads, or may lead, to violations of the rights under the Covenant. For instance, in their public procurement regimes, States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant. Access to export credit and other forms of State support may also be denied in such circumstances, and in transnational contexts, investment treaties may deny protection to foreign investors of the other party that have engaged in conduct leading to a violation of Covenant rights.<sup>101</sup>

<sup>97</sup> See A/68/279, paras. 50-53; and A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 81.

<sup>98</sup> See E/C.12/2016/2 for the Committee's statement on human rights defenders and economic, social and cultural rights. See also Human Rights Council resolution 31/32; and General Assembly resolution 53/144, for the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

<sup>99</sup> See, for example, E/C.12/VNM/CO/2-4, para. 11; E/C.12/1/Add.44, para. 19; E/C.12/IND/CO/5, paras. 12 and 50; E/C.12/PHL/CO/4, para. 15; E/C.12/COD/CO/4, para. 12; E/C.12/LKA/CO/2-4, para. 10; and E/C.12/IDN/CO/1, para. 28.

<sup>100</sup> See A/HRC/32/19, annex, for the guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse (see, in particular, policy objectives 4-8 of the guidance), as well as the Corporate Crimes Principles, developed in October 2016 by the Independent Commission of Experts established by the International Corporate Accountability Roundtable and Amnesty International.

<sup>101</sup> See, for example, International Centre for Settlement of Investment Disputes case No. ARB/07/26, *Urbaser S.A. and others v. Argentina* (award of 8 December 2016), paras. 1194 and 1195.



## 1. Judicial remedies

51. Violations of Covenant rights will often be remedied by an individual claim against the State, whether on the basis of the Covenant itself or on the basis of domestic constitutional or legislative provisions that incorporate the guarantees of the Covenant. However, where the violation is directly attributable to a business entity, victims should be able to sue such an entity either directly on the basis of the Covenant in jurisdictions which consider that the Covenant imposes self-executing obligations on private actors, or on the basis of domestic legislation incorporating the Covenant in the national legal order. In this regard, civil remedies play an important role in ensuring access to justice for victims of violations of Covenant rights.

52. Effective access to justice for indigenous peoples may require States parties to recognize the customary laws, traditions and practices of indigenous peoples and customary ownership over their lands and natural resources in judicial proceedings.<sup>102</sup> States parties should also ensure the use of indigenous languages and/or interpreters in courts and the availability of legal services and information on remedies in indigenous languages,<sup>103</sup> as well as providing training to court officials on indigenous history, legal traditions and customs.

## 2. Non-judicial remedies

53. While they generally should not be seen as a substitute for judicial mechanisms (which often remain indispensable for effective protection against certain violations of Covenant rights), non-judicial remedies may contribute to providing effective remedy to victims whose Covenant rights have been violated by business actors and ensuring accountability for such violations. These alternative mechanisms should be adequately coordinated with available judicial mechanisms, both in relation to the sanction and to the compensation for victims.

54. States parties should make use of a wide range of administrative and quasi-judicial mechanisms, many of which already regulate and adjudicate aspects of business activity in many States parties, such as labour inspectorates and tribunals, consumer and environmental protection agencies and financial supervision authorities. States parties should explore options for extending the mandate of these bodies or creating new ones, with the capacity to receive and resolve complaints of alleged corporate abuse of certain Covenant rights, to investigate allegations, to impose sanctions and to provide for and enforce reparations for the victims. National human rights institutions should be encouraged to establish appropriate structures within their organizations in order to monitor States' obligations with regard to business and human rights, and they could be empowered to receive claims from victims of corporate conduct.

55. State-based non-judicial mechanisms should provide effective protection for victims' rights. Where such alternative non-judicial mechanisms are established, they should also possess a number of characteristics ensuring that they are credible and can contribute effectively to the prevention of and reparation for violations;<sup>104</sup> their decisions should be enforceable, and such mechanisms should be accessible to all.

56. Non-judicial mechanisms for indigenous victims should be developed with the indigenous peoples concerned through their own representative institutions. As with judicial remedies, States parties should address barriers to indigenous peoples accessing the mechanism, including language barriers.<sup>105</sup>

<sup>102</sup> See A/68/279, para. 34; and Committee on the Elimination of Racial Discrimination, general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5 (e).

<sup>103</sup> A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 47; and Committee on the Elimination of Racial Discrimination, general recommendation No. 31, para. 30.

<sup>104</sup> See Guiding Principles on Business and Human Rights, principle 31.

<sup>105</sup> See A/68/279, para. 36.

57. Furthermore, non-judicial remedies should also be available in transnational settings. Examples include access by victims located outside the State's territory to that State's human rights institutions or ombudspersons as well as to complaints mechanisms established under international organizations, such as the national contact points operating under the OECD Guidelines for Multinational Enterprises.

## V. Implementation

58. Ensuring that business activities are pursued in line with the requirements of the Covenant requires an ongoing effort from States parties. To support this, the national action plans or strategies that States parties are expected to adopt to ensure full realization of the Covenant rights should specifically address the question of the role of business entities in the progressive realization of Covenant rights.

59. Following the adoption of the Guiding Principles on Business and Human Rights, many States or regional organizations have adopted action plans on business and human rights.<sup>106</sup> This is a welcome development, particularly if such action plans set specific and concrete targets, allocate responsibilities across actors, and define the time frame and necessary means for their adoption. Action plans on business and human rights should incorporate human rights principles, including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency. Progress in implementing such action plans should be monitored, and such plans should place equal emphasis on all categories of human rights, including economic, social and cultural rights. As regards the requirement of participation in the design of such plans, the Committee recalls the fundamental role that national human rights institutions and civil society organizations can and should play in achieving the full realization of Covenant rights in the context of business activities.

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<sup>106</sup> See recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe, appendix, paras. 10-12.