



**International  
Human Rights  
Instruments**

Distr.  
GENERAL

HRI/GEN/1/Rev.9 (Vol. I)  
27 May 2008

Original: ENGLISH

---

**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
<b>II. GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE .....</b>	<b>172</b>
General comment No. 1: Reporting obligation .....	173
General comment No. 2: Reporting guidelines .....	173
General comment No. 3: Article 2 (Implementation at the national level) .....	174
General comment No. 4: Article 3 (Equal right of men and women to the enjoyment of all civil and political rights) .....	175
General comment No. 5: Article 4 (Derogations) .....	176
General comment No. 6: Article 6 (Right to life) .....	176
General comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment) .....	178
General comment No. 8: Article 9 (Right to liberty and security of persons) .....	179
General comment No. 9: Article 10 (Humane treatment of persons deprived of their liberty) .....	180
General comment No. 10: Article 19 (Freedom of opinion) .....	181
General comment No. 11: Article 20 .....	182
General comment No. 12: Article 1 (Right to self-determination) .....	183
General comment No. 13: Article 14 (Administration of justice) .....	184
General comment No. 14: Article 6 (Right to life) .....	188
General comment No. 15: The position of aliens under the Covenant .....	189

**CONTENTS (*continued*)**

	<i>Page</i>
General comment No. 16: Article 17 (Right to privacy) .....	191
General comment No. 17: Article 24 (Rights of the child) .....	193
General comment No. 18: Non-discrimination .....	195
General comment No. 19: Article 23 (The family) .....	198
General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) .....	200
General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty) .....	202
General comment No. 22: Article 18 (Freedom of thought, conscience or religion) .....	204
General comment No. 23: Article 27 (Rights of minorities) .....	207
General comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant .....	210
General comment No. 25: Article 25 (Participation in public affairs and the right to vote) .....	217
General comment No. 26: Continuity of obligations .....	222
General comment No. 27: Article 12 (Freedom of movement) .....	223
General comment No. 28: Article 3 (The equality of rights between men and women) .....	228
General comment No. 29: Article 4: Derogations during a state of emergency .....	234
General comment No. 30: Reporting obligations of States parties under article 40 of the Covenant .....	242
General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant .....	243
General comment No. 32: Right to equality before courts and tribunals and to a fair trial .....	248

**CONTENTS (*continued*)**

*Page*

**Volume II**

**III. GENERAL RECOMMENDATIONS ADOPTED BY THE COMMITTEE  
ON THE ELIMINATION OF RACIAL DISCRIMINATION**

General recommendation I concerning States parties' obligations  
(art. 4 of the Convention)

General recommendation II concerning States parties' obligations

General recommendation III concerning reporting by States parties

General recommendation IV concerning reporting by States parties  
(art. 1 of the Convention)

General recommendation V concerning reporting by States parties  
(art. 7 of the Convention)

General recommendation VI concerning overdue reports

General recommendation VII relating to the implementation of article 4

General recommendation VIII concerning the interpretation and  
application of article 1, paragraphs 1 and 4, of the Convention

General recommendation IX concerning the application of article 8,  
paragraph 1, of the Convention

General recommendation X concerning technical assistance

General recommendation XI on non-citizens

General recommendation XII on successor States

General recommendation XIII on the training of law enforcement  
officials in the protection of human rights

General recommendation XIV on article 1, paragraph 1, of the Convention

General recommendation XV on article 4 of the Convention

General recommendation XVI concerning the application  
of article 9 of the Convention

General recommendation XVII on the establishment of national  
institutions to facilitate the implementation of the Convention

**CONTENTS (*continued*)**

*Page*

General recommendation XVIII on the establishment of an international tribunal to prosecute crimes against humanity

General recommendation XIX on article 3 of the Convention

General recommendation XX on article 5 of the Convention

General recommendation XXI on the right to self-determination

General recommendation XXII on article 5 of the Convention on refugees and displaced persons

General recommendation XXIII on the rights of indigenous peoples

General recommendation XXIV concerning article 1 of the Convention

General recommendation XXV on gender-related dimensions of racial discrimination

General recommendation XXVI on article 6 of the Convention

General recommendation XXVII on discrimination against Roma

General recommendation XXVIII on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance

General recommendation XXIX on article 1, paragraph 1, of the Convention (Descent)

General recommendation XXX on discrimination against non-citizens

General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system

**IV. GENERAL RECOMMENDATIONS ADOPTED BY THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN**

General recommendation No. 1: Reporting by States parties

General recommendation No. 2: Reporting by States parties

General recommendation No. 3: Education and public information campaigns

**CONTENTS (*continued*)**

*Page*

- General recommendation No. 4: Reservations
- General recommendation No. 5: Temporary special measures
- General recommendation No. 6: Effective national machinery and publicity
- General recommendation No. 7: Resources
- General recommendation No. 8: Implementation of article 8 of the Convention
- General recommendation No. 9: Statistical data concerning the situation of women
- General recommendation No. 10: Tenth anniversary of the adoption of the Convention on the Elimination of All Forms of Discrimination against Women
- General recommendation No. 11: Technical advisory services for reporting obligations
- General recommendation No. 12: Violence against women
- General recommendation No. 13: Equal remuneration for work of equal value
- General recommendation No. 14: Female circumcision
- General recommendation No. 15: Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS)
- General recommendation No. 16: Unpaid women workers in rural and urban family enterprises
- General recommendation No. 17: Measurement and quantification of the unremunerated domestic activities of women and their recognition in the gross national product
- General recommendation No. 18: Disabled women
- General recommendation No. 19: Violence against women
- General recommendation No. 20: Reservations to the Convention
- General recommendation No. 21: Equality in marriage and family relations
- General recommendation No. 22: Amending article 20 of the Convention

**CONTENTS (*continued*)**

*Page*

General recommendation No. 23: Political and public life

General recommendation No. 24: Article 12 of the Convention (women and health)

General recommendation No. 25: Article 4, paragraph 1, of the Convention  
(temporary special measures)

**V. GENERAL COMMENTS ADOPTED BY THE COMMITTEE  
AGAINST TORTURE**

General comment No. 1: Implementation of article 3 of the Convention  
in the context of article 22 (Refoulement and communications)

General comment No. 2: Implementation of article 2 by States parties

**VI. GENERAL COMMENTS ADOPTED BY THE COMMITTEE ON  
THE RIGHTS OF THE CHILD**

General comment No. 1: The aims of education

General comment No. 2: The role of independent national human  
rights institutions in the promotion and protection of the rights  
of the child

General comment No. 3: HIV/AIDS and the rights of the child

General comment No. 4: Adolescent health and development in the  
context of the Convention on the Rights of the Child

General comment No. 5: General measures of implementation of the  
Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)

General comment No. 6: Treatment of unaccompanied and separated  
children outside their country of origin

General comment No. 7: Implementing child rights in early childhood

General comment No. 8: The right of the child to protection  
from corporal punishment and other cruel and degrading  
forms of punishment (arts. 19; 28 para. 2; and 37, *inter alia*)

General comment No. 9: The rights of children with disabilities

General comment No. 10: Children's rights in juvenile justice



## **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

---

\* 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

---

\* 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,

---

\* 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.

---

\* 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.

---

\* 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.

---

\* 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.

### General bibliography

Albouy, François-Xavier y Kessler, Denis. Un système de retraite européen: une utopie réalisable? Revue Française des Affaires Sociales, No. hors-série, noviembre de 1989.

Aranguren, José Luis. La vejez como autorrealización personal y social. Ministerio Asuntos Sociales. Madrid, 1992.

Beauvoir, Simone de: La vieillesse. Gallimard 1970 (Edhasa, 1983).

Cebrián Badia, Francisco Javier: La jubilación forzosa del trabajador y su derecho al trabajo. Actualidad Laboral No. 14, Madrid, 1991.

Commission des Communautés Européennes: L'Europe dans le mouvement démographique (Mandat du 21 juin 1989), Bruselas, junio de 1990.

Duran Heras, Almudena. Anticipo de la jubilación en España. Revista de Seguridad Social, No. 41, Madrid, 1989.

Fuentes, C. Josefa. Situación Social del Anciano. Alcalá de Henares, 1975.

Fundación Europea para la Mejora de las Condiciones de Vida y de Trabajo. Informe Anual 1989, Luxemburgo. Oficina de las publicaciones oficiales de las Comunidades Europeas, 1990.

Girard, Paulette. Vieillissement et emploi, vieillissement et travail. Haut Conseil de la Population et de la Famille. Documentation française, 1989.

Guillemard, Anne Marie. Analisis de las políticas de vejez en Europa. Ministerio de Asuntos Sociales. Madrid, 1992.

Guillemard, Anne Marie. Emploi, protection sociale et cycle de vie: Résultat d'une comparaison internationale des dispositifs de sortie anticipée d'activité. Sociologie du travail, No. 3, Paris, 1993.

H. Draus, Renate. Le troisième âge en la République fédérale allemande. Observations et diagnostics économiques, No. 22, enero de 1988.

Hermanova, Hana. Envejecer con salud en Europa en los años 90 Jornadas Europeas sobre personas mayores. Alicante, 1993.

INSERSO (Instituto Nacional de Servicios Sociales). La Tercera Edad en Europe: Necesidades y Demandas. Ministerio de Asuntos Sociales, Madrid, 1989.

INSERSO. La Tercera Edad en España: Necesidades y Demandas. Ministerio de Asuntos Sociales, Madrid, 1990.

INSERSO. La Tercera Edad en España: Aspectos cuantitativos. Ministerio de Asuntos Sociales, Madrid, 1989.

- ISE (Instituto Sindical Europeo). Los jubilados en Europa Occidental: Desarrollo y Posiciones Sindicales, Bruselas, 1988.
- Lansley, John y Pearson, Maggie. Preparación a la jubilación en los países de la Comunidad Europea. Seminario celebrado en Francfort del Main, 10 a 12 de octubre de 1988. Luxemburgo: Oficina de Publicaciones Oficiales de las Comunidades Europeas, 1989.
- Martínez-Fornes, Santiago, Envejecer en el año 2000. Editorial Popular, S.A. Ministerio de Asuntos Sociales, Madrid, 1991.
- Minois, George. Historia de la vejez: De la Antigüedad al Renacimiento. Editorial Nerea, Madrid, 1989.
- Ministerio de Trabajo. Seminario sobre Trabajadores de Edad Madura. Ministerio de Trabajo, Madrid, 1968.
- OCDE. Flexibilité de l'âge de la retraite. OCDE, Paris, 1970.
- OCDE. Indicadores Sociales. Informes OCDE. Ministerio de Trabajo y Seguridad Social, Madrid, 1985.
- OCDE. El futuro de la protección social y el envejecimiento de la población. Informes OCDE. Ministerio de Trabajo y Seguridad Social, Madrid, 1990.
- OIT. Trabajadores de Edad Madura: Trabajo y Jubilación. 65a. Reunión de la Conferencia Internacional del Trabajo. Ginebra, 1965.
- OIT. De la pirámide al pilar de población: los cambios en la población y la seguridad social. Informes OIT. Ministerio de Trabajo y Seguridad Social, Madrid, 1990.
- OIT. La OIT y las personas de edad avanzada. Ginebra, 1992.
- PNUD. Desarrollo Humano. Informe 1990. Tercer Mundo Editores, Bogotá, 1990.
- Simposio de Gerontología de Castilla-León. Hacia una vejez nueva. I Simposio de Gerontología de Castilla-León. 5 a 8 de mayo de 1988. Fundación Friedrich Ebert, Salamanca, 1988.
- Uceda Povedano, Josefina. La jubilación: reflexiones en torno a la edad de jubilación en la CEE: especial referencia al casa español. Escuela Social, Madrid, 1988.
- Vellas, Pierre. Législation sanitaire et les personnes âgées. OMS, Publications régionales. Série européenne, No. 33.

**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

---

\* 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

---

\* 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.

---

\* 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;

---

\* 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.

---

\* 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".

---

\* 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

---

\* 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*.\* 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.

---

\* 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).

## II. GENERAL COMMENTS\* ADOPTED BY THE HUMAN RIGHTS COMMITTEE\*\*

### Introduction\*\*\*

The introduction to document CCPR/C/21/Rev.1 (General comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights; date: 19 May 1989) explains the purpose of the general comments as follows:

“The Committee wishes to reiterate its desire to assist States parties in fulfilling their reporting obligations. These general comments draw attention to some aspects of this matter but do not purport to be limitative or to attribute any priority between different aspects of the implementation of the Covenant. These comments will, from time to time, be followed by others as constraints of time and further experience may make possible.

“The Committee so far has examined 77 initial reports, 34 second periodic reports and, in some cases, additional information and supplementary reports. This experience, therefore, now covers a significant number of the States which have ratified the Covenant, at present 87. They represent different regions of the world with different

---

\* For the nature and purpose of the general comments, see *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex VII, introduction. For a description of the history of the method of work, the elaboration of general comments and their use, *ibid.*, *Thirty-ninth Session, Supplement No. 40 (A/39/40 and Corr.1 and 2)*, paragraphs 541-557. For the text of the general comments already adopted by the Committee, *ibid.*, *Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex VII; *ibid.*, *Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex VI, *ibid.*, *Thirty-eighth Session, Supplement No. 40 (A/38/40)*, annex VI; *ibid.*, *Thirty-ninth Session, Supplement No. 40 (A/39/40 and Corr.1 and 2)*, annex V; *ibid.*, *Fortieth Session, Supplement No. 40 (A/40/40)*, annex VI; *ibid.*, *Forty-first Session, Supplement No. 40 (A/41/40)*, annex VI; *ibid.*, *Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI; *ibid.*, *Forty-fourth Session, Supplement No. 40 (A/44/40)*, annex VI; *ibid.*, *Forty-fifth Session, Supplement No. 40 (A/45/40)*, annex VI; *ibid.*, *Forty-seventh Session, Supplement No. 40 (A/47/40)*, annex VI; *ibid.*, *Forty-ninth Session, Supplement No. 40 (A/49/40)*, annex V; and *ibid.*, *Fiftieth Session, Supplement No. 40 (A/45/40)*, annex V; and *ibid.*, *Fifty-third Session, Supplement No. 40 (A/53/40)*, annex VII. Also issued in documents CCPR/C/21/Rev.1 and Rev.1/Add.1-9.

\*\* For document references, see annex 2.

\*\*\* See *Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40)*, annex VII.

political, social and legal systems and their reports illustrate most of the problems which may arise in implementing the Covenant, although they do not afford any complete basis for a worldwide review of the situation as regards civil and political rights.

“The purpose of these general comments is to make this experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights. These comments should also be of interest to other States, especially those preparing to become parties to the Covenant and thus to strengthen the cooperation of all States in the universal promotion and protection of human rights.”

### **Thirteenth session (1981)**

#### **General comment No. 1: Reporting obligation**

[General comment No. 1 has been replaced by general comment No. 30]

States parties have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests. Until the present time only the first part of this provision, calling for initial reports, has become regularly operative. The Committee notes, as appears from its annual reports, that only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default despite repeated reminders and other actions by the Committee. The fact that most States parties have nevertheless, even if somewhat late, engaged in a constructive dialogue with the Committee suggests that the States parties normally ought to be able to fulfil the reporting obligation within the time limit prescribed by article 40 (1) and that it would be in their own interest to do so in the future. In the process of ratifying the Covenant, States should pay immediate attention to their reporting obligation since the proper preparation of a report which covers so many civil and political rights necessarily does require time.

### **Thirteenth session (1981)**

#### **General comment No. 2: Reporting guidelines**

1. The Committee has noted that some of the reports submitted initially were so brief and general that the Committee found it necessary to elaborate general guidelines regarding the form and content of reports. These guidelines were designed to ensure that reports are presented in a uniform manner and to enable the Committee and States parties to obtain a complete picture of the situation in each State as regards the implementation of the rights referred to in the Covenant. Despite the guidelines, however, some reports are still so brief and general that they do not satisfy the reporting obligations under article 40.

2. Article 2 of the Covenant requires States parties to adopt such legislative or other measures and provide such remedies as may be necessary to implement the Covenant. Article 40 requires States parties to submit to the Committee reports on the measures adopted by them, on the progress made in the enjoyment of the Covenant rights and the factors and difficulties, if any, affecting the implementation of the Covenant. Even reports which were in their form generally in accordance with the guidelines have in substance been incomplete. It has been difficult to understand from some reports whether the Covenant had been implemented as part of national legislation and many of them were clearly incomplete as regards relevant legislation. In some reports the role of national bodies or organs in supervising and in implementing the rights had not been made clear. Further, very few reports have given any account of the factors and difficulties affecting the implementation of the Covenant.

3. The Committee considers that the reporting obligation embraces not only the relevant laws and other norms relating to the obligations under the Covenant but also the practices and decisions of courts and other organs of the State party as well as further relevant facts which are likely to show the degree of the actual implementation and enjoyment of the rights recognized in the Covenant, the progress achieved and factors and difficulties in implementing the obligations under the Covenant.

4. It is the practice of the Committee, in accordance with Rule 68 of its Provisional Rules of Procedure, to examine reports in the presence of representatives of the reporting States. All States whose reports have been examined have cooperated with the Committee in this way but the level, experience and the number of representatives have varied. The Committee wishes to state that, if it is to be able to perform its functions under article 40 as effectively as possible and if the reporting State is to obtain the maximum benefit from the dialogue, it is desirable that the States representatives should have such status and experience (and preferably be in such number) as to respond to questions put, and the comments made, in the Committee over the whole range of matters covered by the Covenant.

### **Thirteenth session (1981)**

#### **General comment No. 3: Article 2 (Implementation at the national level)**

1. The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. article 3 which is dealt with in general comment No. 4 below), but in principle this undertaking relates to all rights set forth in the Covenant.

2. In this connection, it is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. It is desirable also to give publicity to the State party's cooperation with the Committee.

### **Thirteenth session (1981)**

#### **General comment No. 4: Article 3 (Equal right of men and women to the enjoyment of all civil and political rights)**

1. Article 3 of the Covenant requiring, as it does, States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant, has been insufficiently dealt with in a considerable number of States reports and has raised a number of concerns, two of which may be highlighted.

2. Firstly, article 3, as articles 2 (1) and 26 insofar as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard.

3. Secondly, the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. One example, among others, is the degree to which immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the woman to marriage to non-citizens or to hold public office.

4. The Committee, therefore, considers that it might assist States parties if special attention were given to a review by specially appointed bodies or institutions of laws or measures which inherently draw a distinction between men and women insofar as those laws or measures adversely affect the rights provided for in the Covenant and, secondly, that States parties should give specific information in their reports about all measures, legislative or otherwise, designed to implement their undertaking under this article.

5. The Committee considers that it might help the States parties in implementing this obligation, if more use could be made of existing means of international cooperation with a view to exchanging experience and organizing assistance in solving the practical problems connected with the insurance of equal rights for men and women.

**Thirteenth session (1981)**

**General comment No. 5: Article 4 (Derogations)**

[General comment No. 5 has been replaced by general comment No. 29]

1. Article 4 of the Covenant has posed a number of problems for the Committee when considering reports from some States parties. When a public emergency which threatens the life of a nation arises and it is officially proclaimed, a State party may derogate from a number of rights to the extent strictly required by the situation. The State party, however, may not derogate from certain specific rights and may not take discriminatory measures on a number of grounds. The State party is also under an obligation to inform the other States parties immediately, through the Secretary-General, of the derogations it has made including the reasons therefor and the date on which the derogations are terminated.
2. States parties have generally indicated the mechanism provided in their legal systems for the declaration of a state of emergency and the applicable provisions of the law governing derogations. However, in the case of a few States which had apparently derogated from Covenant rights, it was unclear not only whether a state of emergency had been officially declared but also whether rights from which the Covenant allows no derogation had in fact not been derogated from and further whether the other States parties had been informed of the derogations and of the reasons for the derogations.
3. The Committee holds the view that measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened and that, in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made. The Committee also considers that it is equally important for States parties, in times of public emergency, to inform the other States parties of the nature and extent of the derogations they have made and of the reasons therefor and, further, to fulfil their reporting obligations under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the relevant documentation.

**Sixteenth session (1982)**

**General comment No. 6: Article 6 (Right to life)**

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.
2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except



in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.

4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression “inherent right to life” cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States’ reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. The Committee is of the opinion that the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant.

The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

### **Sixteenth session (1982)**

#### **General comment No. 7: Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment)**

[General comment No. 7 has been replaced by general comment No. 20]

1. In examining the reports of States parties, members of the Committee have often asked for further information under article 7 which prohibits, in the first place, torture or cruel, inhuman or degrading treatment or punishment. The Committee recalls that even in situations of public emergency such as are envisaged by article 4 (1) this provision is non-derogable under article 4 (2). Its purpose is to protect the integrity and dignity of the individual. The Committee notes that it is not sufficient for the implementation of this article to prohibit such treatment or punishment or to make it a crime. Most States have penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal, including the right to obtain compensation. Among the safeguards which may make control effective are provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials not to apply such treatment.

2. As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority. For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10 (1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person.

3. In particular, the prohibition extends to medical or scientific experimentation without the free consent of the person concerned (art. 7, second sentence). The Committee notes that the reports of States parties have generally given little or no information on this point. It takes the view that at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent.

### **Sixteenth session (1982)**

#### **General comment No. 8: Article 9 (Right to liberty and security of persons)**

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. It is true that some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

3. Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement “to trial within a reasonable time or to release” under paragraph 3. Pre-trial detention should be an exception and as short as possible. The Committee would welcome information concerning mechanisms existing and measures taken with a view to reducing the duration of such detention.

4. Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted.

**Sixteenth session (1982)**

**General comment No. 9: Article 10 (Humane treatment of persons  
deprived of their liberty)**

[General comment No. 9 has been replaced by general comment No. 21]

1. Article 10, paragraph 1 of the Covenant provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. However, by no means all the reports submitted by States parties have contained information on the way in which this paragraph of the article is being implemented. The Committee is of the opinion that it would be desirable for the reports of States parties to contain specific information on the legal measures designed to protect that right. The Committee also considers that reports should indicate the concrete measures being taken by the competent State organs to monitor the mandatory implementation of national legislation concerning the humane treatment and respect for the human dignity of all persons deprived of their liberty that paragraph 1 requires.

The Committee notes, in particular, that paragraph 1 of this article is generally applicable to persons deprived of their liberty, whereas paragraph 2 deals with accused as distinct from convicted persons, and paragraph 3 with convicted persons only. This structure quite often is not reflected in the reports, which mainly have related to accused and convicted persons. The wording of paragraph 1, its context - especially its proximity to article 9, paragraph 1, which also deals with all deprivations of liberty - and its purpose support a broad application of the principle expressed in that provision. Moreover, the Committee recalls that this article supplements article 7 as regards the treatment of all persons deprived of their liberty.

The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which cannot depend entirely on material resources. While the Committee is aware that in other respects the modalities and conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by article 2 (1).

Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions.

2. Subparagraph 2 (a) of the article provides that, save in exceptional circumstances, accused persons shall be segregated from convicted persons and shall receive separate treatment appropriate to their status as unconvicted persons. Some reports have failed to pay proper attention to this direct requirement of the Covenant and, as a result, to provide adequate information on the way in which the treatment of accused persons differs from that of convicted persons. Such information should be included in future reports.

Subparagraph 2 (b) of the article calls, *inter alia*, for accused juvenile persons to be separated from adults. The information in reports shows that a number of States are not taking

sufficient account of the fact that this is an unconditional requirement of the Covenant. It is the Committee's opinion that, as is clear from the text of the Covenant, deviation from States parties' obligations under subparagraph 2 (b) cannot be justified by any consideration whatsoever.

3. In a number of cases, the information appearing in reports with respect to paragraph 3 of the article has contained no concrete mention either of legislative or administrative measures or of practical steps to promote the reformation and social rehabilitation of prisoners, by, for example, education, vocational training and useful work. Allowing visits, in particular by family members, is normally also such a measure which is required for reasons of humanity. There are also similar lacunae in the reports of certain States with respect to information concerning juvenile offenders, who must be segregated from adults and given treatment appropriate to their age and legal status.

4. The Committee further notes that the principles of humane treatment and respect for human dignity set out in paragraph 1 are the basis for the more specific and limited obligations of States in the field of criminal justice set out in paragraphs 2 and 3 of article 10. The segregation of accused persons from convicted ones is required in order to emphasize their status as unconvicted persons who are at the same time protected by the presumption of innocence stated in article 14, paragraph 2. The aim of these provisions is to protect the groups mentioned, and the requirements contained therein should be seen in that light. Thus, for example, the segregation and treatment of juvenile offenders should be provided for in such a way that it promotes their reformation and social rehabilitation.

### **Nineteenth session (1983)**

#### **General comment No. 10: Article 19 (Freedom of opinion)**

1. Paragraph 1 requires protection of the "right to hold opinions without interference". This is a right to which the Covenant permits no exception or restriction. The Committee would welcome information from States parties concerning paragraph 1.

2. Paragraph 2 requires protection of the right to freedom of expression, which includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice". Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.

3. Many State reports confine themselves to mentioning that freedom of expression is guaranteed under the Constitution or the law. However, in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent

information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual's right.

4. Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraph 3; and they must be justified as being "necessary" for that State party for one of those purposes.

### **Nineteenth session (1983)**

#### **General comment No. 11: Article 20**

1. Not all reports submitted by States parties have provided sufficient information as to the implementation of article 20 of the Covenant. In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them. Furthermore, many reports failed to give sufficient information concerning the relevant national legislation and practice.

2. Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations. For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee, therefore, believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, and should themselves refrain from any such propaganda or advocacy.

**Twenty-first session (1984)**

**General comment No. 12: Article 1 (Right to self-determination)**

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.
2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely “determine their political status and freely pursue their economic, social and cultural development”. The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.
3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties’ reports should contain information on each paragraph of article 1.
4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.
5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”. This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.
6. Paragraph 3, in the Committee’s opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that “The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in

conformity with the provisions of the Charter of the United Nations”. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States’ obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

### **Twenty-first session (1984)**

#### **General comment No. 13: Article 14 (Administration of justice)**

1. The Committee notes that article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments. All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. Not all reports provided details on the legislative or other measures adopted specifically to implement each of the provisions of article 14.

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of “criminal charge” and “rights and obligations in a suit at law” are interpreted in relation to their respective legal systems.

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in



particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that “everyone shall be entitled to a fair and public hearing”. Paragraph 3 of the article elaborates on the requirements of a “fair hearing” in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

6. The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.

7. The Committee has noted a lack of information regarding article 14, paragraph 2 and, in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.

8. Among the minimum guarantees in criminal proceedings prescribed by paragraph 3, the first concerns the right of everyone to be informed in a language which he understands of the charge against him (subpara. (a)). The Committee notes that State reports often do not explain how this right is respected and ensured. Article 14 (3) (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge “promptly” requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

10. Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place “without undue delay”. To make this right effective, a procedure must be available in order to ensure that the trial will proceed “without undue delay”, both in first instance and on appeal.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

12. Subparagraph 3 (e) states that the accused shall be entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.

13. Subparagraph 3 (f) provides that if the accused cannot understand or speak the language used in court he is entitled to the assistance of an interpreter free of any charge. This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.

14. Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

15. In order to safeguard the rights of the accused under paragraphs 1 and 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution.

16. Article 14, paragraph 4, provides that in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation. Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of "the desirability of promoting their rehabilitation". Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14.

17. Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and the powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement, and the way in which the procedures before review tribunals take account of the fair and public hearing requirements of paragraph 1 of article 14.

18. Article 14, paragraph 6, provides for compensation according to law in certain cases of a miscarriage of justice as described therein. It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area in order to bring it into line with the provisions of the Covenant.

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most

States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7.

### **Twenty-third session (1984)**

#### **General comment No. 14: Article 6 (Right to life)**

1. In its general comment No. 6 [16] adopted at its 378th meeting on 27 July 1982, the Human Rights Committee observed that the right to life enunciated in the first paragraph of article 6 of the International Covenant on Civil and Political Rights is the supreme right from which no derogation is permitted even in time of public emergency. The same right to life is enshrined in article 3 of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. It is basic to all human rights.
2. In its previous general comment, the Committee also observed that it is the supreme duty of States to prevent wars. War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year.
3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.
4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.
5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.
6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.
7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

**Twenty-seventh session (1986)**

**General comment No. 15: The position of aliens under the Covenant**

1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to “all individuals within its territory and subject to its jurisdiction” (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.

2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee’s experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.

3. A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights. Legislation and case law may also play an important part in providing for the rights of aliens. The Committee has been informed that in some States fundamental rights, though not guaranteed to aliens by the Constitution or other legislation, will also be extended to them as required by the Covenant. In certain cases, however, there has clearly been a failure to implement Covenant rights without discrimination in respect of aliens.

4. The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. The position of aliens would thus be considerably improved. States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction.

5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

8. Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, *inter alia*, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art. 12, para. 4).

9. Many reports have given insufficient information on matters relevant to article 13. That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national and international law may apply. Normally an alien who is expelled must be allowed to leave for any country that agrees to take him. The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art. 26).

10. Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when “compelling reasons of national security” so require. Discrimination may not be made between different categories of aliens in the application of article 13.

### **Thirty-second session (1988)**

#### **General comment No. 16: Article 17 (Right to privacy)**

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.
2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.
3. The term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.
4. The expression “arbitrary interference” is also relevant to the protection of the right provided for in article 17. In the Committee’s view the expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by 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.

5. Regarding the term “family”, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term “home” in English, “manzel” in Arabic, “zhùzhái” in Chinese, “domicile” in French, “zhilische” in Russian and “domicilio” in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms “family” and “home”.

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by the law. It is also indispensable to have information on the authorities which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the right provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual’s private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person’s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.



10. The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

### **Thirty-fifth session (1989)**

#### **General comment No. 17: Article 24 (Rights of the child)**

1. Article 24 of the International Covenant on Civil and Political Rights recognizes the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor. Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. The reports submitted by States parties often seem to underestimate this obligation and supply inadequate information on the way in which children are afforded enjoyment of their right to a special protection.

2. In this connection, the Committee points out that the rights provided for in article 24 are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protection than adults. Thus, as far as the right to life is concerned, the death penalty cannot be imposed for crimes committed by persons under 18 years of age. Similarly, if lawfully deprived of their liberty, accused juvenile persons shall be separated from adults and are entitled to be brought as speedily as possible for adjudication; in turn, convicted juvenile offenders shall be subject to a penitentiary system that involves segregation from adults and is appropriate to their age and legal status, the aim being to foster reformation and social rehabilitation. In other instances, children are protected by the possibility of the restriction - provided that such restriction is warranted - of a right recognized by the Covenant, such as the right to publicize a judgement in a suit at law or a criminal case, from which an exception may be made when the interest of the minor so requires.

3. In most cases, however, the measures to be adopted are not specified in the Covenant and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction. The Committee notes in this regard that such measures, although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural. For example, every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children and to prevent them from being subjected to acts of violence and cruel and inhuman treatment or from being exploited by means of forced labour or prostitution, or by their use in the illicit trafficking of narcotic drugs, or by any other means. In the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression. Moreover, the Committee wishes to draw the attention of States parties to the need to include in their reports information on measures adopted to ensure that children do not take a direct part in armed conflicts.

4. The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions. In this respect, States should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States should also indicate the age at which a child is legally entitled to work and the age at which he is treated as an adult under labour law. States should further indicate the age at which a child is considered adult for the purposes of article 10, paragraphs 2 and 3. However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.

5. The Covenant requires that children should be protected against discrimination on any grounds such as race, colour, sex, language, religion, national or social origin, property or birth. In this connection, the Committee notes that, whereas non-discrimination in the enjoyment of the rights provided for in the Covenant also stems, in the case of children, from article 2 and their equality before the law from article 26, the non-discrimination clause contained in article 24 relates specifically to the measures of protection referred to in that provision. Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field, including inheritance, particularly as between children who are nationals and children who are aliens or as between legitimate children and children born out of wedlock.

6. Responsibility for guaranteeing children the necessary protection lies with the family, society and the State. Although the Covenant does not indicate how such responsibility is to be apportioned, it is primarily incumbent on the family, which is interpreted broadly to include all persons composing it in the society of the State party concerned, and particularly on the parents, to create conditions to promote the harmonious development of the child's personality and his enjoyment of the rights recognized in the Covenant. However, since it is quite common for the father and mother to be gainfully employed outside the home, reports by States parties should indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child. Moreover, in cases where the parents and the

family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require. If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents. The Committee considers it useful that reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.

7. Under article 24, paragraph 2, every child has the right to be registered immediately after birth and to have a name. In the Committee's opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality. Providing for the right to have a name is of special importance in the case of children born out of wedlock. The main purpose of the obligation to register children after birth is to reduce the danger of abduction, sale or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Covenant. Reports by States parties should indicate in detail the measures that ensure the immediate registration of children born in their territory.

8. Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality, as provided for in article 24, paragraph 3. While the purpose of this provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents. The measures adopted to ensure that children have a nationality should always be referred to in reports by States parties.

### **Thirty-seventh session (1989)**

#### **General comment No. 18: Non-discrimination**

1. Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.
3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.
4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.
5. The Committee wishes to draw the attention of States parties to the fact that the Covenant sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.
6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the

Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

### **Thirty-ninth session (1990)**

#### **General comment No. 19: Article 23 (The family)**

1. Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family. In their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.
2. The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23. Consequently, States parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of the family, “nuclear” and “extended”, exist within a State, this should be indicated with an explanation of the degree of protection afforded to each. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.
3. Ensuring the protection provided for under article 23 of the Covenant requires that States parties should adopt legislative, administrative or other measures. States parties should provide detailed information concerning the nature of such measures and the means whereby their effective implementation is assured. In fact, since the Covenant also recognizes the right of the family to protection by society, States parties’ reports should indicate how the necessary protection is granted to the family by the State and other social institutions, whether and to what extent the State gives financial or other support to the activities of such institutions, and how it ensures that these activities are compatible with the Covenant.

4. Article 23, paragraph 2, of the Covenant reaffirms the right of men and women of marriageable age to marry and to found a family. Paragraph 3 of the same article provides that no marriage shall be entered into without the free and full consent of the intending spouses. States parties' reports should indicate whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity. The Covenant does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law. In this connection, the Committee wishes to note that such legal provisions must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages. In the Committee's view, however, for a State to require that a marriage, which is celebrated in accordance with religious rites, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant. States are also requested to include information on this subject in their reports.

5. The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.

6. Article 23, paragraph 4, of the Covenant provides that States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

7. With regard to equality as to marriage, the Committee wishes to note in particular that no sex-based discrimination should occur in respect of the acquisition or loss of nationality by reason of marriage. Likewise, the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded.

8. During marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.

9. Thus, any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection. States parties should, in particular, include information in their reports concerning the provision made for the necessary protection of any children at the dissolution of a marriage or on the separation of the spouses.

**Forty-fourth session (1992)**

**General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)**

1. This general comment replaces general comment No. 7 (the sixteenth session, 1982) reflecting and further developing it.
2. The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity. The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”
3. The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.
4. The Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.
5. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim. In the Committee’s view, moreover, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.
6. The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7. As the Committee has stated in its general comment No. 6 (16), article 6 of the Covenant refers generally to abolition of the death penalty in terms that strongly suggest that abolition is desirable. Moreover, when the death penalty is applied by a State party for the most serious crimes, it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.
7. Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to



such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.

8. The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.

9. In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

10. The Committee should be informed how States parties disseminate, to the population at large, relevant information concerning the ban on torture and the treatment prohibited by article 7. Enforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training. States parties should inform the Committee of the instruction and training given and the way in which the prohibition of article 7 forms an integral part of the operational rules and ethical standards to be followed by such persons.

11. In addition to describing steps to provide the general protection against acts prohibited under article 7 to which anyone is entitled, the State party should provide detailed information on safeguards for the special protection of particularly vulnerable persons. It should be noted that keeping under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment is an effective means of preventing cases of torture and ill-treatment. To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention. In that connection, States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment. The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

12. It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.

13. States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment,

specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible. Consequently, those who have refused to obey orders must not be punished or subjected to any adverse treatment.

14. Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.

15. The Committee has noted that some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

#### **Forty-fourth session (1992)**

##### **General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)**

1. This general comment replaces general comment No. 9 (the sixteenth session, 1982) reflecting and further developing it.
2. Article 10, paragraph 1, of the International Covenant on Civil and Political Rights applies to any one deprived of liberty under the laws and authority of the State who is held in prisons, hospitals - particularly psychiatric hospitals - detention camps or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held.
3. Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
5. States parties are invited to indicate in their reports to what extent they are applying the relevant United Nations standards applicable to the treatment of prisoners: the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982).
6. The Committee recalls that reports should provide detailed information on national legislative and administrative provisions that have a bearing on the right provided for in article 10, paragraph 1. The Committee also considers that it is necessary for reports to specify what concrete measures have been taken by the competent authorities to monitor the effective application of the rules regarding the treatment of persons deprived of their liberty. States parties should include in their reports information concerning the system for supervising penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment, and how impartial supervision is ensured.
7. Furthermore, the Committee recalls that reports should indicate whether the various applicable provisions form an integral part of the instruction and training of the personnel who have authority over persons deprived of their liberty and whether they are strictly adhered to by such personnel in the discharge of their duties. It would also be appropriate to specify whether arrested or detained persons have access to such information and have effective legal means enabling them to ensure that those rules are respected, to complain if the rules are ignored and to obtain adequate compensation in the event of a violation.
8. The Committee recalls that the principle set forth in article 10, paragraph 1, constitutes the basis for the more specific obligations of States parties in respect of criminal justice, which are set forth in article 10, paragraphs 2 and 3.
9. Article 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States parties should indicate how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.
10. As to article 10, paragraph 3, which concerns convicted persons, the Committee wishes to have detailed information on the operation of the penitentiary system of the State party. No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner. States parties are invited to specify whether they have a system to provide assistance after release and to give information as to its success.

11. In a number of cases, the information furnished by the State party contains no specific reference either to legislative or administrative provisions or to practical measures to ensure the re-education of convicted persons. The Committee requests specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and also concerning work programmes for prisoners inside the penitentiary establishment as well as outside.

12. In order to determine whether the principle set forth in article 10, paragraph 3, is being fully respected, the Committee also requests information on the specific measures applied during detention, e.g., how convicted persons are dealt with individually and how they are categorized, the disciplinary system, solitary confinement and high-security detention and the conditions under which contacts are ensured with the outside world (family, lawyer, social and medical services, non-governmental organizations).

13. Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant. The text also provides that cases involving juveniles must be considered as speedily as possible. Reports should specify the measures taken by States parties to give effect to that provision. Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status insofar as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation. Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice. States should give relevant information about the age groups of persons treated as juveniles. In that regard, States parties are invited to indicate whether they are applying the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987).

### **Forty-eighth session (1993)**

#### **General comment No. 22: Article 18 (Freedom of thought, conscience or religion)**

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms “belief” and “religion” are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.
3. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.
4. The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private”. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.
5. The Committee observes that the freedom to “have or to adopt” a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.
6. The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee

notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its general comment No. 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2 of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination.

Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

#### **Fiftieth session (1994)**

#### **General comment No. 23: Article 27 (Rights of minorities)**

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States parties under article 40 of the Covenant, the obligations placed upon States parties under article 27 have sometimes been confused with their duty under article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1. The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.<sup>1</sup>

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources.<sup>2</sup> This may particularly be true of members of indigenous communities constituting a minority.

4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not.<sup>3</sup> Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.



5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.<sup>4</sup>

6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.<sup>5</sup> The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the

Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.

### Notes

<sup>1</sup> See *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40* (A/39/40), annex VI, general comment No. 12 (21) (art. 1), also issued in document CCPR/C/21/Rev.1; *ibid.*, *Forty-fifth Session, Supplement No. 40*, (A/45/40, vol. II, annex IX, section A, communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990.

<sup>2</sup> See *ibid.*, *Forty-third Session, Supplement No. 40* (A/43/40), annex VII, section G, communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.

<sup>3</sup> See *ibid.*, *Forty-second Session, Supplement No. 40* (A/42/40), annex VIII, section D, communication No. 182/1984 (*F.H. Zwaan-de Vries v. the Netherlands*), views adopted on 9 April 1987; *ibid.*, section C, communication No. 180/1984 (*L.G. Danning v. the Netherlands*), views adopted on 9 April 1987.

<sup>4</sup> See *ibid.*, *Forty-fifth Session, Supplement No. 40*, (A/45/40), volume II, annex X, section A, communication No. 220/1987 (*T.K. v. France*), decision of 8 November 1989; *ibid.*, section B, communication No. 222/1987 (*M.K. v. France*), decision of 8 November 1989.

<sup>5</sup> See notes 1 and 2 above, communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990, and communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.

### Fifty-second session (1994)

#### **General comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant**

1. As of 1 November 1994, 46 of the 127 States parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they, and other States parties, have in fact undertaken. And the Committee, in the performance of its duties under either article 40 of the Covenant or under the

Optional Protocols, must know whether a State is bound by a particular obligation or to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

2. For these reasons the Committee has deemed it useful to address in a general comment the issues of international law and human rights policy that arise. The general comment identifies the principles of international law that apply to the making of reservations and by reference to which their acceptability is to be tested and their purport to be interpreted. It addresses the role of States parties in relation to the reservations of others. It further addresses the role of the Committee itself in relation to reservations. And it makes certain recommendations to present States parties for a reviewing of reservations and to those States that are not yet parties about legal and human rights policy considerations to be borne in mind should they consider ratifying or acceding with particular reservations.

3. It is not always easy to distinguish a reservation from a declaration as to a State's understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation.<sup>1</sup> Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

4. The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.

5. The Covenant neither prohibits reservations nor mentions any type of permitted reservation. The same is true of the first Optional Protocol. The Second Optional Protocol provides, in article 2, paragraph 1, that "No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime." Paragraphs 2 and 3 provide for certain procedural obligations.

6. The absence of a prohibition on reservations does not mean that any reservation is permitted. The matter of reservations under the Covenant and the first Optional Protocol is governed by international law. Article 19 (3) of the Vienna Convention on the Law of Treaties provides relevant guidance.<sup>2</sup> It stipulates that where a reservation is not prohibited by the treaty or falls within the specified permitted categories, a State may make a reservation provided it is not incompatible with the object and purpose of the treaty. Even though, unlike some other human rights treaties, the Covenant does not incorporate a specific reference to the object and purpose test, that test governs the matter of interpretation and acceptability of reservations.

7. In an instrument which articulates very many civil and political rights, each of the many articles, and indeed their interplay, secures the objectives of the Covenant. The object and purpose of the Covenant is to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken.

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (art. 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (art. 2 (2)).

10. The Committee has further examined whether categories of reservations may offend the “object and purpose” test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. A reservation to the provisions of article 4 itself, which precisely stipulates the balance to be struck between the interests of the State and the rights of the individual in times of emergency, would fall in this category. And some non-derogable rights, which in any event cannot be reserved because of their status as peremptory norms, are also of this character - the

prohibition of torture and arbitrary deprivation of life are examples.<sup>3</sup> While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. A State may not reserve the right not to present a report and have it considered by the Committee. The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. To this end certain attendant requirements are likely to be necessary. Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

13. The issue arises as to whether reservations are permissible under the first Optional Protocol and, if so, whether any such reservation might be contrary to the object and purpose of the Covenant or of the first Optional Protocol itself. It is clear that the first Optional Protocol is itself an international treaty, distinct from the Covenant but closely related to it. Its object and purpose is to recognize the competence of the Committee to receive and consider communications from individuals who claim to be victims of a violation by a State party of any of the rights in the Covenant. States accept the substantive rights of individuals by reference to the Covenant, and not the first Optional Protocol. The function of the first Optional Protocol is to allow claims in respect of those rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the

first Optional Protocol when it has not previously been made in respect of the same rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to the object and purpose of the first Optional Protocol, even if not of the Covenant. A reservation to a substantive obligation made for the first time under the first Optional Protocol would seem to reflect an intention by the State concerned to prevent the Committee from expressing its views relating to a particular article of the Covenant in an individual case.

14. The Committee considers that reservations relating to the required procedures under the first Optional Protocol would not be compatible with its object and purpose. The Committee must control its own procedures as specified by the Optional Protocol and its rules of procedure. Reservations have, however, purported to limit the competence of the Committee to acts and events occurring after entry into force for the State concerned of the first Optional Protocol. In the view of the Committee this is not a reservation but, most usually, a statement consistent with its normal competence *ratione temporis*. At the same time, the Committee has insisted upon its competence, even in the face of such statements or observations, when events or acts occurring before the date of entry into force of the first Optional Protocol have continued to have an effect on the rights of a victim subsequent to that date. Reservations have been entered which effectively add an additional ground of inadmissibility under article 5, paragraph 2, by precluding examination of a communication when the same matter has already been examined by another comparable procedure. Insofar as the most basic obligation has been to secure independent third party review of the human rights of individuals, the Committee has, where the legal right and the subject-matter are identical under the Covenant and under another international instrument, viewed such a reservation as not violating the object and purpose of the first Optional Protocol.

15. The primary purpose of the Second Optional Protocol is to extend the scope of the substantive obligations undertaken under the Covenant, as they relate to the right to life, by prohibiting execution and abolishing the death penalty.<sup>4</sup> It has its own provision concerning reservations, which is determinative of what is permitted. Article 2, paragraph 1, provides that only one category of reservation is permitted, namely one that reserves the right to apply the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime. Two procedural obligations are incumbent upon States parties wishing to avail themselves of such a reservation. Article 2, paragraph 1, obliges such a State to inform the Secretary-General, at the time of ratification or accession, of the relevant provisions of its national legislation during warfare. This is clearly directed towards the objectives of specificity and transparency and in the view of the Committee a purported reservation unaccompanied by such information is without legal effect. Article 2, paragraph 3, requires a State making such a reservation to notify the Secretary-General of the beginning or ending of a state of war applicable to its territory. In the view of the Committee, no State may seek to avail itself of its reservation (that is, have execution in time of war regarded as lawful) unless it has complied with the procedural requirement of article 2, paragraph 3.

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, the International Court of Justice has indicated in the Reservations to the Genocide Convention Case (1951) that a State which objected to a reservation on the grounds of incompatibility with the object and purpose of a treaty could, through objecting, regard the treaty as not in effect as between itself and the reserving State. Article 20, paragraph 4, of the Vienna Convention on the Law of Treaties 1969 contains provisions most relevant to the present case on acceptance of and objection to reservations. This provides for the possibility of a State to object to a reservation made by another State. Article 21 deals with the legal effects of objections by States to reservations made by other States. Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to.

17. As indicated above, it is the Vienna Convention on the Law of Treaties that provides the definition of reservations and also the application of the object and purpose test in the absence of other specific provisions. But the Committee believes that its provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place, save perhaps in the limited context of reservations to declarations on the Committee's competence under article 41. And because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. Objections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard the Covenant as not in effect as between the parties concerned. In short, the pattern is so unclear that it is not safe to assume that a non-objecting State thinks that a particular reservation is acceptable. In the view of the Committee, because of the special characteristics of the Covenant as a human rights treaty, it is open to question what effect objections have between States *inter se*. However, an objection to a reservation made by States may provide some guidance to the Committee in its interpretation as to its compatibility with the object and purpose of the Covenant.

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because, as indicated above, it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. In order to know the scope of its duty to examine a State's compliance under article 40 or a communication under the first Optional Protocol, the Committee has necessarily to take a view on the compatibility of a reservation with the object and purpose of the Covenant and with general international law. Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established

objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken. Reservations may thus not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto. When considering the compatibility of possible reservations with the object and purpose of the Covenant, States should also take into consideration the overall effect of a group of reservations, as well as the effect of each reservation on the integrity of the Covenant, which remains an essential consideration. States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law. States should not seek through reservations or interpretative declarations to determine that the meaning of a provision of the Covenant is the same as that given by an organ of any other international treaty body.

20. States should institute procedures to ensure that each and every proposed reservation is compatible with the object and purpose of the Covenant. It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. States should also ensure that the necessity for maintaining reservations is periodically reviewed, taking into account any observations and recommendations made by the Committee during examination of their reports. Reservations should be withdrawn at the earliest possible moment. Reports to the Committee should contain information on what action has been taken to review, reconsider or withdraw reservations.

### Notes

<sup>1</sup> Article 2 (1) (d), Vienna Convention on the Law of Treaties 1969.

<sup>2</sup> Although the Vienna Convention on the Law of Treaties was concluded in 1969 and entered into force in 1980 - i.e. after the entry into force of the Covenant - its terms reflect the general international law on this matter as had already been affirmed by the International Court of Justice in *The Reservations to the Genocide Convention Case* of 1951.



<sup>3</sup> Reservations have been entered to both article 6 and article 7, but not in terms which reserve a right to torture or to engage in arbitrary deprivation of life.

<sup>4</sup> The competence of the Committee in respect of this extended obligation is provided for under article 5 - which itself is subject to a form of reservation in that the automatic granting of this competence may be reserved through the mechanism of a statement made to the contrary at the moment of ratification or accession.

### **Fifty-seventh session (1996)<sup>1 2</sup>**

#### **General comment No. 25: Article 25 (Participation in public affairs and the right to vote)**

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.

2. The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of “every citizen”. State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.

4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be

suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.

5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

6. Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law.

10. The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

12. Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. States parties should indicate in their reports the manner in which the difficulties highlighted in this paragraph are dealt with.

13. State reports should describe the rules governing the right to vote, and the application of those rules in the period covered by the report. State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.

14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

15. The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.

16. Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.

17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

18. State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for the removal of elected office holders should be described.

19. In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and

the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. Reports should describe the electoral system and explain how the different political views in the community are represented in elected bodies. Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.

23. Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.

24. State reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

26. The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.

27. Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.

### Notes

<sup>1</sup> Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

<sup>2</sup> The number in parenthesis indicates the session at which the general comment was adopted.

### Sixty-first session (1997)\*

#### General comment No. 26: Continuity of obligations

1. The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty.

2. That the parties to the Covenant did not admit the possibility of denunciation and that it was not a mere oversight on their part to omit reference to denunciation is demonstrated by the fact that article 41 (2) of the Covenant does permit a State party to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice to that effect while there is no such provision for denunciation of or withdrawal from the Covenant itself. Moreover, the Optional Protocol to the Covenant, negotiated and adopted contemporaneously with it, permits States parties to denounce it. Additionally, by way of comparison, the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted one year prior to the Covenant, expressly permits denunciation. It can therefore be concluded that the drafters of the Covenant deliberately intended to exclude the possibility of denunciation. The same conclusion applies to the Second Optional Protocol in the drafting of which a denunciation clause was deliberately omitted.

3. Furthermore, it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation. Together with the simultaneously prepared and adopted International Covenant on Economic, Social and Cultural Rights, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, the three instruments together often being referred to as the “International Bill of Human Rights”.

---

\* Contained in document A/53/40, annex VII.

As such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.

4. The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant.

5. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.

### **Sixty-seventh session (1999)\***

#### **General comment No. 27: Article 12 (Freedom of movement)**

1. Liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant, as is often shown in the Committee's practice in considering reports from States parties and communications from individuals. Moreover, the Committee in its general comment No. 15 ("The position of aliens under the Covenant", 1986) referred to the special link between articles 12 and 13.<sup>1</sup>

2. The permissible limitations which may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.

3. States parties should provide the Committee in their reports with the relevant domestic legal rules and administrative and judicial practices relating to the rights protected by article 12, taking into account the issues discussed in the present general comment. They must also include information on remedies available if these rights are restricted.

#### **Liberty of movement and freedom to choose residence (para. 1)**

4. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. In principle, citizens of a State are always lawfully within the territory of that State. The question whether an alien is "lawfully" within the territory of a State is a matter governed by domestic law, which may subject the entry of an alien to the territory of a State to restrictions, provided they are in compliance with the State's international obligations. In that connection, the Committee has held that an alien who

---

\* Contained in document CCPR/C/21/Rev.1/Add.9.

entered the State illegally, but whose status has been regularized, must be considered to be lawfully within the territory for the purposes of article 12.<sup>2</sup> Once a person is lawfully within a State, any restrictions on his or her rights guaranteed by article 12, paragraphs 1 and 2, as well as any treatment different from that accorded to nationals, have to be justified under the rules provided for by article 12, paragraph 3.<sup>3</sup> It is, therefore, important that States parties indicate in their reports the circumstances in which they treat aliens differently from their nationals in this regard and how they justify this difference in treatment.

5. The right to move freely relates to the whole territory of a State, including all parts of federal States. According to article 12, paragraph 1, persons are entitled to move from one place to another and to establish themselves in a place of their choice. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place. Any restrictions must be in conformity with paragraph 3.

6. The State party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.

7. Subject to the provisions of article 12, paragraph 3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory. Lawful detention, however, affects more specifically the right to personal liberty and is covered by article 9 of the Covenant. In some circumstances, articles 12 and 9 may come into play together.<sup>4</sup>

#### **Freedom to leave any country, including one's own (para. 2)**

8. Freedom to leave the territory of a State may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration. Likewise, the right of the individual to determine the State of destination is part of the legal guarantee. As the scope of article 12, paragraph 2, is not restricted to persons lawfully within the territory of a State, an alien being legally expelled from the country is likewise entitled to elect the State of destination, subject to the agreement of that State.<sup>5</sup>

9. In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality.<sup>6</sup> Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere.<sup>7</sup> It is no justification for the State to claim that its national would be able to return to its territory without a passport.

10. The practice of States often shows that legal rules and administrative measures adversely affect the right to leave, in particular, a person's own country. It is therefore of the utmost importance that States parties report on all legal and practical restrictions on the right to leave



which they apply both to nationals and to foreigners, in order to enable the Committee to assess the conformity of these rules and practices with article 12, paragraph 3. States parties should also include information in their reports on measures that impose sanctions on international carriers which bring to their territory persons without required documents, where those measures affect the right to leave another country.

### **Restrictions (para. 3)**

11. Article 12, paragraph 3, provides for exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted. This provision authorizes the State to restrict these rights only to protect national security, public order (*ordre public*), public health or morals and the rights and freedoms of others. To be permissible, restrictions must be provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant (see paragraph 18 below).

12. The law itself has to establish the conditions under which the rights may be limited. State reports should therefore specify the legal norms upon which restrictions are founded. Restrictions which are not provided for in the law or are not in conformity with the requirements of article 12, paragraph 3, would violate the rights guaranteed by paragraphs 1 and 2.

13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1); the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.

16. States have often failed to show that the application of their laws restricting the rights enshrined in article 12, paragraphs 1 and 2, are in conformity with all requirements referred to in article 12, paragraph 3. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. These conditions would not be met, for example, if an individual were prevented from leaving a country merely on the ground that he or she is the holder of "State secrets", or if an individual were prevented from travelling internally without a specific permit. On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities.<sup>8</sup>

17. A major source of concern is the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals. These rules and practices include, inter alia, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country. In the light of these practices, States parties should make sure that all restrictions imposed by them are in full compliance with article 12, paragraph 3.

18. The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In examining State reports, the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.

#### **The right to enter one's own country (para. 4)**

19. The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.

20. The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase "his own country".<sup>9</sup> The scope of "his own country" is broader than the concept "country of his nationality". It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there

been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.

21. In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by 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 considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.

#### Notes

<sup>1</sup> HRI/GEN/1/Rev.3, 15 August 1997, p. 20 (para. 8).

<sup>2</sup> Communication No. 456/1991, *Celepli v. Sweden*, paragraph 9.2.

<sup>3</sup> General comment No. 15, paragraph 8, in HRI/GEN/1/Rev.3, 15 August 1997, p. 20.

<sup>4</sup> See, for example, communication No. 138/1983, *Mpandajila v. Zaire*, paragraph 10; communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, paragraph 10; communication Nos. 241/1987 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, paragraph 13.

<sup>5</sup> See general comment No. 15, paragraph 9, in HRI/GEN/1/Rev.3, 15 August 1997, p. 21.

<sup>6</sup> See communication No. 106/1981, *Montero v. Uruguay*, paragraph 9.4; communication No. 57/1979, *Vidal Martins v. Uruguay*, paragraph 7; communication No. 77/1980, *Lichtensztejn v. Uruguay*, paragraph 6.1.

<sup>7</sup> See communication No. 57/1979, *Vidal Martins v. Uruguay*, paragraph 9.

<sup>8</sup> See general comment No. 23, paragraph 7, in HRI/GEN/1/Rev.3, 15 August 1997, p. 41.

<sup>9</sup> See communication No. 538/1993, *Stewart v. Canada*.

**Sixty-eighth session (2000)**

**General comment No. 28: Article 3 (The equality of rights  
between men and women)<sup>1</sup>**

1. The Committee has decided to update its general comment on article 3 of the Covenant and to replace general comment No. 4 (thirteenth session, 1981), in the light of the experience it has gathered in its activities over the last 20 years. The present revision seeks to take account of the important impact of this article on the enjoyment by women of the human rights protected under the Covenant.
2. Article 3 implies that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.
3. The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women. States parties must provide information regarding the actual role of women in society so that the Committee may ascertain what measures, in addition to legislative provisions, have been or should be taken to give effect to these obligations, what progress has been made, what difficulties are encountered and what steps are being taken to overcome them.
4. States parties are responsible for ensuring the equal enjoyment of rights without any discrimination. Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.
5. Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights. States parties should furnish appropriate information on those aspects of tradition, history, cultural practices and religious attitudes which jeopardize, or may jeopardize, compliance with article 3, and indicate what measures they have taken or intend to take to overcome such factors.
6. In order to fulfil the obligation set forth in article 3, States parties should take account of the factors which impede the equal enjoyment by women and men of each right specified in the Covenant. To enable the Committee to obtain a complete picture of the situation of women in each State party as regards the implementation of the rights in the Covenant, this general

comment identifies some of the factors affecting the equal enjoyment by women of the rights under the Covenant and spells out the type of information that is required with regard to these rights.

7. The equal enjoyment of human rights by women must be protected during a state of emergency (art. 4). States parties which take measures derogating from their obligations under the Covenant in time of public emergency, as provided in article 4, should provide information to the Committee with respect to the impact on the situation of women of such measures and should demonstrate that they are non-discriminatory.

8. Women are particularly vulnerable in times of internal or international armed conflicts. States parties should inform the Committee of all measures taken during these situations to protect women from rape, abduction and other forms of gender-based violence.

9. In becoming parties to the Covenant, States undertake, in accordance with article 3, to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and in accordance with article 5, nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights provided for in article 3, or at limitations not covered by the Covenant. Moreover, there shall be no restriction upon or derogation from the equal enjoyment by women of all fundamental human rights recognized or existing pursuant to law, conventions, regulations or customs, on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. When reporting on the right to life protected by article 6, States parties should provide data on birth rates and on pregnancy- and childbirth-related deaths of women. Gender-disaggregated data should be provided on infant mortality rates. States parties should give information on any measures taken by the State to help women prevent unwanted pregnancies, and to ensure that they do not have to undergo life-threatening clandestine abortions. States parties should also report on measures to protect women from practices that violate their right to life, such as female infanticide, the burning of widows and dowry killings. The Committee also wishes to have information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.

11. To assess compliance with article 7 of the Covenant, as well as with article 24, which mandates special protection for children, the Committee needs to be provided information on national laws and practice with regard to domestic and other types of violence against women, including rape. It also needs to know whether the State party gives access to safe abortion to women who have become pregnant as a result of rape. The States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization. In States parties where the practice of genital mutilation exists information on its extent and on measures to eliminate it should be provided. The information provided by States parties on all these issues should include measures of protection, including legal remedies, for women whose rights under article 7 have been violated.

12. Having regard to their obligations under article 8, States parties should inform the Committee of measures taken to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, *inter alia*, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women's and children's rights.

13. States parties should provide information on any specific regulation of clothing to be worn by women in public. The Committee stresses that such regulations may involve a violation of a number of rights guaranteed by the Covenant, such as: article 26, on non-discrimination; article 7, if corporal punishment is imposed in order to enforce such a regulation; article 9, when failure to comply with the regulation is punished by arrest; article 12, if liberty of movement is subject to such a constraint; article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; articles 18 and 19, when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.

14. With regard to article 9, States parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house (see general comment No. 8, paragraph 1).

15. As regards articles 7 and 10, States parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that accused juvenile females shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits. Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.

16. As regards article 12, States parties should provide information on any legal provision or any practice which restricts women's right to freedom of movement, for example the exercise of marital powers over the wife or of parental powers over adult daughters; legal or *de facto* requirements which prevent women from travelling, such as the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. States parties should also report on measures taken to eliminate such laws and practices and to protect women against them, including reference to available domestic remedies (see general comment No. 27, paragraphs 6 and 18).

17. States parties should ensure that alien women are accorded on an equal basis the right to submit arguments against their expulsion and to have their case reviewed, as provided in article 13. In this regard, they should be entitled to submit arguments based on gender-specific violations of the Covenant such as those mentioned in paragraphs 10 and 11 above.

18. States parties should provide information to enable the Committee to ascertain whether access to justice and the right to a fair trial, provided for in article 14, are enjoyed by women on equal terms with men. In particular, States parties should inform the Committee whether there are legal provisions preventing women from direct and autonomous access to the courts (see communication No. 202/1986, *Ato del Avellanal v. Peru*, Views of 28 October 1988); whether women may give evidence as witnesses on the same terms as men; and whether measures are taken to ensure women equal access to legal aid, in particular in family matters. States parties should report on whether certain categories of women are denied the enjoyment of the presumption of innocence under article 14, paragraph 2, and on the measures which have been taken to put an end to this situation.

19. The right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status. This right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family. States must provide information on laws or practices that prevent women from being treated or from functioning as full legal persons and the measures taken to eradicate laws or practices that allow such treatment.

20. States parties must provide information to enable the Committee to assess the effect of any laws and practices that may interfere with women's right to enjoy privacy and other rights protected by article 17 on the basis of equality with men. An example of such interference arises where the sexual life of a woman is taken into consideration in deciding the extent of her legal rights and protections, including protection against rape. Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion. In these instances, other rights in the Covenant, such as those of articles 6 and 7, might also be at stake. Women's privacy may also be interfered with by private actors, such as employers who request a pregnancy test before hiring a woman. States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17, and on the measures taken to eliminate such interference and to afford women protection from any such interference.

21. States parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination. These freedoms, protected by article 18, must not be subject to restrictions other

than those authorized by the Covenant and must not be constrained by, *inter alia*, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion; States parties should therefore provide information on the status of women as regards their freedom of thought, conscience and religion, and indicate what steps they have taken or intend to take both to eliminate and prevent infringements of these freedoms in respect of women and to protect their right not to be discriminated against.

22. In relation to article 19, States parties should inform the Committee of any laws or other factors which may impede women from exercising the rights protected under this provision on an equal basis. As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.

23. States are required to treat men and women equally in regard to marriage in accordance with article 23, which has been elaborated further by general comment No. 19 (1990). Men and women have the right to enter into marriage only with their free and full consent, and States have an obligation to protect the enjoyment of this right on an equal basis. Many factors may prevent women from being able to make the decision to marry freely. One factor relates to the minimum age for marriage. That age should be set by the State on the basis of equal criteria for men and women. These criteria should ensure women's capacity to make an informed and uncoerced decision. A second factor in some States may be that either by statutory or customary law a guardian, who is generally male, consents to the marriage instead of the woman herself, thereby preventing women from exercising a free choice.

24. Another factor that may affect women's right to marry only when they have given free and full consent is the existence of social attitudes which tend to marginalize women victims of rape and put pressure on them to agree to marriage. A woman's free and full consent to marriage may also be undermined by laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim. States parties should indicate whether marrying the victim extinguishes or mitigates criminal responsibility and, in the case in which the victim is a minor, whether the rape reduces the marriageable age of the victim, particularly in societies where rape victims have to endure marginalization from society. A different aspect of the right to marry may be affected when States impose restrictions on remarriage by women that are not imposed on men. Also, the right to choose one's spouse may be restricted by laws or practices that prevent the marriage of a woman of a particular religion to a man who professes no religion or a different religion. States should provide information on these laws and practices and on the measures taken to abolish the laws and eradicate the practices which undermine the right of women to marry only when they have given free and full consent. It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.

25. To fulfil their obligations under article 23, paragraph 4, States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education, the capacity to transmit to children the parent's nationality, and the ownership or administration of property,



whether common property or property in the sole ownership of either spouse. States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary. Also, States parties should ensure that no sex-based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage, of residence rights, and of the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name. Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.

26. States parties must also ensure equality in regard to the dissolution of marriage, which excludes the possibility of repudiation. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations. Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.

27. In giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these contexts (see general comment No. 19, paragraph 2). Single-parent families frequently consist of a single woman caring for one or more children, and States parties should describe what measures of support are in place to enable her to discharge her parental functions on the basis of equality with a man in a similar position.

28. The obligation of States parties to protect children (art. 24) should be carried out equally for boys and girls. States parties should report on measures taken to ensure that girls are treated equally to boys in education, in feeding and in health care, and provide the Committee with disaggregated data in this respect. States parties should eradicate, both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children.

29. The right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate affirmative action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex. The Committee requires States parties to provide statistical information on the percentage of women in publicly elected office, including the legislature, as well as in high-ranking civil service positions and the judiciary.

30. Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.

31. The right to equality before the law and freedom from discrimination, protected by article 26, requires States to act against discrimination by public and private agencies in all fields. Discrimination against women in areas such as social security laws (communications Nos. 172/84, *Broeks v. Netherlands*, Views of 9 April 1987; 182/84, *Zwaan de Vries v. the Netherlands*, Views of 9 April 1987; 218/1986, *Vos v. the Netherlands*, Views of 29 March 1989) as well as in the area of citizenship or rights of non-citizens in a country (communication No. 035/1978, *Aumeeruddy-Cziffra et al. v. Mauritius*, Views adopted 9 April 1981) violates article 26. The commission of so-called “honour crimes” which remain unpunished constitutes a serious violation of the Covenant and in particular of articles 6, 14 and 26. Laws which impose more severe penalties on women than on men for adultery or other offences also violate the requirement of equal treatment. The Committee has also often observed in reviewing States parties’ reports that a large proportion of women are employed in areas which are not protected by labour laws and that prevailing customs and traditions discriminate against women, particularly with regard to access to better paid employment and to equal pay for work of equal value. States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services. States parties should report on all these measures and provide information on the remedies available to victims of such discrimination.

32. The rights which persons belonging to minorities enjoy under article 27 of the Covenant in respect of their language, culture and religion do not authorize any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law. States should report on any legislation or administrative practices related to membership in a minority community that might constitute an infringement of the equal rights of women under the Covenant (communication No. 24/1977, *Lovelace v. Canada*, Views adopted July 1981) and on measures taken or envisaged to ensure the equal right of men and women to enjoy all civil and political rights in the Covenant. Likewise, States should report on measures taken to discharge their responsibilities in relation to cultural or religious practices within minority communities that affect the rights of women. In their reports, States parties should pay attention to the contribution made by women to the cultural life of their communities.

#### Note

<sup>1</sup> Adopted by the Committee at its 1834th meeting (sixty-eighth session), on 29 March 2000.

#### Seventy-second session (2001)

##### **General comment No. 29: Article 4: Derogations during a state of emergency\***

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to

---

\* Adopted at the 1950th meeting, on 24 July 2001.

derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. In this general comment, replacing its general comment No. 5, adopted at the thirteenth session (1981), the Committee seeks to assist States parties to meet the requirements of article 4.

2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.

3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.<sup>1</sup>

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.<sup>2</sup> Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the

Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.<sup>3</sup>

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (art. 12) or freedom of assembly (art. 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

6. The fact that some of the provisions of the Covenant have been listed in article 4 (para. 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.

7. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2, to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18,

paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.<sup>4</sup>

8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (arts. 2, 3, 14, para. 1, 23, para. 4, 24, para. 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency.<sup>5</sup> In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.<sup>6</sup>

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., arts. 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., arts. 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international

law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.<sup>7</sup>

13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.

(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (para. 1), as well as in the non-derogable nature of article 18.

(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.<sup>8</sup> The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.<sup>9</sup>

17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4, for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected: States parties have failed to notify other States parties, through the Secretary-General, of a proclamation of a state of emergency and of the resulting measures of

derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers.<sup>10</sup> Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

### Notes

<sup>1</sup> See the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, paragraph 7; Dominican Republic (1993), CCPR/C/79/Add.18, paragraph 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, paragraph 23; Peru (1996), CCPR/C/79/Add.67, paragraph 11; Bolivia (1997), CCPR/C/79/Add.74, paragraph 14; Colombia (1997), CCPR/C/79/Add.76, paragraph 25; Lebanon (1997), CCPR/C/79/Add.78, paragraph 10; Uruguay (1998), CCPR/C/79/Add.90, paragraph 8; Israel (1998), CCPR/C/79/Add.93, paragraph 11.

<sup>2</sup> See, for instance, articles 12 and 19 of the Covenant.

<sup>3</sup> See, for example, concluding observations on Israel (1998), CCPR/C/79/Add.93, paragraph 11.

<sup>4</sup> See the following comments/concluding observations: Dominican Republic (1993), CCPR/C/79/Add.18, paragraph 4; Jordan (1994), CCPR/C/79/Add.35, paragraph 6; Nepal (1994), CCPR/C/79/Add.42, paragraph 9; Russian Federation (1995), CCPR/C/79/Add.54, paragraph 27; Zambia (1996), CCPR/C/79/Add.62, paragraph 11; Gabon (1996), CCPR/C/79/Add.71, paragraph 10; Colombia (1997), CCPR/C/79/Add.76, paragraph 25; Israel (1998), CCPR/C/79/Add.93, paragraph 11; Iraq (1997), CCPR/C/79/Add.84, paragraph 9; Uruguay (1998), CCPR/C/79/Add.90, paragraph 8; Armenia (1998), CCPR/C/79/Add.100, paragraph 7; Mongolia (2000), CCPR/C/79/Add.120, paragraph 14; Kyrgyzstan (2000), CCPR/CO/69/KGZ, paragraph 12.

<sup>5</sup> Reference is made to the Convention on the Rights of the Child which has been ratified by almost all States parties to the Covenant and does not include a derogation clause. As article 38 of the Convention clearly indicates, the Convention is applicable in emergency situations.

<sup>6</sup> Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights



Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Åbo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116). As a field of ongoing further work reference is made to the decision of the 26th International Conference of the Red Cross and Red Crescent (1995) to assign the International Committee of the Red Cross the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.

<sup>7</sup> See articles 6 (genocide) and 7 (crimes against humanity) of the Statute which by 1 July 2001 had been ratified by 35 States. While many of the specific forms of conduct listed in article 7 of the Statute are directly linked to violations against those human rights that are listed as non-derogable provisions in article 4, paragraph 2, of the Covenant, the category of crimes against humanity as defined in that provision covers also violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of article 27 may at the same time constitute genocide under article 6 of the Rome Statute, and article 7, in turn, covers practices that are related to, besides articles 6, 7 and 8 of the Covenant, also articles 9, 12, 26 and 27.

<sup>8</sup> See article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

<sup>9</sup> See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), paragraph 21: "... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency ... The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention." See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: "The Committee is satisfied that States parties generally understand that the right to habeas corpus and *amparo* should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole." *Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40)*, vol. I, annex XI, paragraph 2.

<sup>10</sup> See comments/concluding observations on Peru (1992), CCPR/C/79/Add.8, paragraph 10; Ireland (1993), CCPR/C/79/Add.21, paragraph 11; Egypt (1993), CCPR/C/79/Add.23, paragraph 7; Cameroon (1994), CCPR/C/79/Add.33, paragraph 7; Russian Federation (1995), CCPR/C/79/Add.54, paragraph 27; Zambia (1996), CCPR/C/79/Add.62, paragraph 11; Lebanon (1997), CCPR/C/79/Add.78, paragraph 10; India (1997), CCPR/C/79/Add.81, paragraph 19; Mexico (1999), CCPR/C/79/Add.109, paragraph 12.

**Seventy-fifth session (2002)**

**General comment No. 30: Reporting obligations of States parties  
under article 40 of the Covenant\***

1. States parties have undertaken to submit reports in accordance with article 40 of the Covenant within one year of its entry into force for the States parties concerned and, thereafter, whenever the Committee so requests.
2. The Committee notes, as appears from its annual reports, that only a small number of States have submitted their reports on time. Most of them have been submitted with delays ranging from a few months to several years and some States parties are still in default, despite repeated reminders by the Committee.
3. Other States have announced that they would appear before the Committee but have not done so on the scheduled date.
4. To remedy such situations, the Committee has adopted new rules:
  - (a) If a State party has submitted a report but does not send a delegation to the Committee, the Committee may notify the State party of the date on which it intends to consider the report or may proceed to consider the report at the meeting that had been initially scheduled;
  - (b) When the State party has not presented a report, the Committee may, at its discretion, notify the State party of the date on which the Committee proposes to examine the measures taken by the State party to implement the rights guaranteed under the Covenant:
    - (i) If the State party is represented by a delegation, the Committee will, in presence of the delegation, proceed with the examination on the date assigned;
    - (ii) If the State party is not represented, the Committee may, at its discretion, either decide to proceed to consider the measures taken by the State party to implement the guarantees of the Covenant at the initial date or notify a new date to the State party.

For the purposes of the application of these procedures, the Committee shall hold its meetings in public session if a delegation is present, and in private if a delegation is not present, and shall follow the modalities set forth in the reporting guidelines and in the rules of procedure of the Committee.

---

\* Adopted on 16 July 2002 at its 2025th meeting. This general comment replaces general comment No. 1.

5. After the Committee has adopted concluding observations, a follow-up procedure shall be employed in order to establish, maintain or restore a dialogue with the State party. For this purpose and in order to enable the Committee to take further action, the Committee shall appoint a Special Rapporteur, who will report to the Committee.

6. In the light of the report of the Special Rapporteur, the Committee shall assess the position adopted by the State party and, if necessary, set a new date for the State party to submit its next report.

### **Eightieth session (2004)**

#### **General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant\***

1. This general comment replaces general comment No. 3, reflecting and developing its principles. The general non-discrimination provisions of article 2, paragraph 1, have been addressed in general comment No. 18 and general comment No. 28, and this general comment should be read together with them.

2. While article 2 is couched in terms of the obligations of State parties towards individuals as the right-holders under the Covenant, every State party has a legal interest in the performance by every other State party of its obligations. This follows from the fact that the “rules concerning the basic rights of the human person” are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State party to a treaty being obligated to every other State party to comply with its undertakings under the treaty. In this connection, the Committee reminds States parties of the desirability of making the declaration contemplated in article 41. It further reminds those States parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States parties that have made the declaration under article 41 does not mean that this procedure is the only method by which States parties can assert their interest in the performance of other States parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States parties’ interest in each others’ discharge of their obligations. Accordingly, the Committee commends to States parties the view that violations of Covenant rights by any State party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States parties to the Covenant. A general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 9

---

\* Adopted on 29 March 2004 at its 2187th meeting.

and 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and article 2 in particular are binding on every State party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local) are in a position to engage the responsibility of the State party. The executive branch that usually represents the State party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State party “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. Although article 2, paragraph 2, allows States parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States parties with a federal structure of the terms of article 50, according to which the Covenant’s provisions “shall extend to all parts of federal states without any limitations or exceptions”.

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its general comment No. 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The article 2, paragraph 1, obligations are binding on States parties and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are

amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (art. 18), the freedom of association (art. 22) or the rights of members of minorities (art. 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the (first) Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

10. States parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. As indicated in general comment No. 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State party assigned to an international peacekeeping or peace-enforcement operation.

11. As implied in general comment No. 291, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the article 2 obligation requiring that States parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where

there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

13. Article 2, paragraph 2, requires that States parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless the Covenant's rights are already protected by their domestic laws or practices, States parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate,

reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (art. 7), summary and arbitrary killing (art. 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see general comment No. 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

**Ninetieth session (2007)**

**General comment No. 32: Right to equality before  
courts and tribunals and to a fair trial**

**I. GENERAL REMARKS**

1. This general comment replaces general comment No. 13 (twenty-first session).
2. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.
3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1. Paragraphs 2 - 5 of the article contain procedural guarantees available to persons charged with a criminal offence. Paragraph 6 secures a substantive right to compensation in cases of miscarriage of justice in criminal cases. Paragraph 7 prohibits double jeopardy and thus guarantees a substantive freedom, namely the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted. States parties to the Covenant, in their reports, should clearly distinguish between these different aspects of the right to a fair trial.
4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.
5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.<sup>1</sup>
6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of article 14.<sup>2</sup> Similarly, as article 7 is also non-derogable in its entirety, no statements or confessions or, in



principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency,<sup>3</sup> except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred.<sup>4</sup> Deviating from fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.<sup>5</sup>

## II. EQUALITY BEFORE COURTS AND TRIBUNALS

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.<sup>6</sup>

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum-seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence.<sup>7</sup> This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>8</sup>

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. For instance, where a person sentenced to death seeks available constitutional review of irregularities in a criminal trial but does not have sufficient means to meet the costs of legal assistance in order to pursue such remedy, the State is obliged to provide legal assistance in accordance with article 14, paragraph 1, in conjunction with the right to an effective remedy as enshrined in article 2, paragraph 3 of the Covenant.<sup>9</sup>

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1.<sup>10</sup> In particular, a rigid duty under law to award costs to a winning party without consideration of the implications

thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them.<sup>11</sup>

12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.<sup>12</sup>

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.<sup>13</sup> There is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision.<sup>14</sup> The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.<sup>15</sup> In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases,<sup>16</sup> objective and reasonable grounds must be provided to justify the distinction.

### **III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL**

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.<sup>17</sup>

16. The concept of determination of rights and obligations “in a suit at law” (*de caractère civil/de carácter civil*) is more complex. It is formulated differently in the various languages of the Covenant that, according to article 53 of the Covenant, are equally authentic, and the *travaux préparatoires* do not resolve the discrepancies in the various language texts. The Committee notes that the concept of a “suit at law” or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.<sup>18</sup> The concept encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons,<sup>19</sup> the determination of social security benefits<sup>20</sup> or the pension rights of soldiers,<sup>21</sup> or procedures regarding the use of public land<sup>22</sup> or the taking of private property. In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service,<sup>23</sup> to be appointed as a judge<sup>24</sup> or to have a death sentence commuted by an executive body.<sup>25</sup> Furthermore, there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such as disciplinary measures not amounting to penal sanctions being taken against a civil servant,<sup>26</sup> a member of the armed forces, or a prisoner. This guarantee furthermore does not apply to extradition, expulsion and deportation procedures.<sup>27</sup> Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in these and similar cases, other procedural guarantees may still apply.<sup>28</sup>

18. The notion of a “tribunal” in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. Article 14, paragraph 1, second sentence, guarantees access to such tribunals to all who have criminal charges brought against them. This right cannot be limited, and any criminal conviction by a body not constituting a tribunal is incompatible with this provision. Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example, as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception.<sup>29</sup> The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.<sup>30</sup> A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.<sup>31</sup> It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.<sup>32</sup> The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.<sup>33</sup>

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.<sup>34</sup> Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.<sup>35</sup>

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional,<sup>36</sup> i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.<sup>37</sup>

23. Some countries have resorted to special tribunals of “faceless judges” composed of anonymous judges, e.g. within measures taken to fight terrorist activities. Such courts, even if the identity and status of such judges has been verified by an independent authority, often suffer not only from the fact that the identity and status of the judges is not made known to the accused persons but also from irregularities such as exclusion of the public or even the accused or their representatives<sup>38</sup> from the proceedings;<sup>39</sup> restrictions of the right to a lawyer of their own choice;<sup>40</sup> severe restrictions or denial of the right to communicate with their lawyers, particularly when held incommunicado;<sup>41</sup> threats to the lawyers;<sup>42</sup> inadequate time for preparation of the case;<sup>43</sup> or severe restrictions or denial of the right to summon and examine or have examined witnesses, including prohibitions on cross-examining certain categories of witnesses, e.g. police officers responsible for the arrest and interrogation of the defendant.<sup>44</sup> Tribunals with or without faceless judges, in circumstances such as these, do not satisfy basic standards of fair trial and, in particular, the requirement that the tribunal must be independent and impartial.<sup>45</sup>

24. Article 14 is also relevant where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless

the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence,<sup>46</sup> or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury<sup>47</sup> that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.<sup>48</sup> It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.<sup>49</sup> The same standard applies to specific instructions to the jury by the judge in a trial by jury.<sup>50</sup>

27. An important aspect of the fairness of a hearing is its expeditiousness. While the issue of undue delays in criminal proceedings is explicitly addressed in paragraph 3 (c) of article 14, delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision.<sup>51</sup> Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.<sup>52</sup>

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing.<sup>53</sup> The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations,<sup>54</sup> or to pretrial decisions made by prosecutors and other public authorities.<sup>55</sup>

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must

be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

#### **IV. PRESUMPTION OF INNOCENCE**

30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.<sup>56</sup> Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pretrial detention should never be taken as an indication of guilt and its degree.<sup>57</sup> The denial of bail<sup>58</sup> or findings of liability in civil proceedings<sup>59</sup> do not affect the presumption of innocence.

#### **V. RIGHTS OF PERSONS CHARGED WITH A CRIMINAL OFFENCE**

31. The right of all persons charged with a criminal offence to be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them, enshrined in paragraph 3 (a), is the first of the minimum guarantees in criminal proceedings of article 14. This guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges.<sup>60</sup> Notice of the reasons for an arrest is separately guaranteed in article 9, paragraph 2 of the Covenant.<sup>61</sup> The right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law,<sup>62</sup> or the individual is publicly named as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based. In the case of trials in absentia, article 14, paragraph 3 (a) requires that, notwithstanding the absence of the accused, all due steps have been taken to inform accused persons of the charges and to notify them of the proceedings.<sup>63</sup>

32. Subparagraph 3 (b) provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.<sup>64</sup> In cases of an indigent defendant, communication with counsel might only be assured if a free interpreter is provided during the pretrial and trial phase.<sup>65</sup> What counts as “adequate time” depends on the circumstances of each case. If counsel reasonably feel that the time for the preparation of the defence is insufficient, it is incumbent on them to request the adjournment of the trial.<sup>66</sup> A State party is not to be held responsible for the conduct of a defence lawyer, unless it was, or should have been, manifest to the judge that the lawyer’s

behaviour was incompatible with the interests of justice.<sup>67</sup> There is an obligation to grant reasonable requests for adjournment, in particular, when the accused is charged with a serious criminal offence and additional time for preparation of the defence is needed.<sup>68</sup>

33. “Adequate facilities” must include access to documents and other evidence; this access must include all materials<sup>69</sup> that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim. If the accused does not speak the language in which the proceedings are held, but is represented by counsel who is familiar with the language, it may be sufficient that the relevant documents in the case file are made available to counsel.<sup>70</sup>

34. The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications.<sup>71</sup> Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter.

35. The right of the accused to be tried without undue delay, provided for by article 14, paragraph 3 (c), is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice. What is reasonable has to be assessed in the circumstances of each case,<sup>72</sup> taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where the accused are denied bail by the court, they must be tried as expeditiously as possible.<sup>73</sup> This guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence, but also the time until the final judgement on appeal.<sup>74</sup> All stages, whether in first instance or on appeal must take place “without undue delay.”

36. Article 14, paragraph 3 (d) contains three distinct guarantees. First, the provision requires that accused persons are entitled to be present during their trial. Proceedings in the absence of the accused may in some circumstances be permissible in the interest of the proper administration of justice, i.e. when accused persons, although informed of the proceedings sufficiently in advance, decline to exercise their right to be present. Consequently, such trials are only compatible with article 14, paragraph 3 (d) if the necessary steps are taken to summon accused persons in a timely manner and to inform them beforehand about the date and place of their trial and to request their attendance.<sup>75</sup>

37. Second, the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing and to be informed of this right, as provided for by article 14, paragraph 3 (d), refers to two types of defence which are not mutually exclusive. Persons assisted by a lawyer have the right to instruct their lawyer on the conduct of their case,

within the limits of professional responsibility, and to testify on their own behalf. At the same time, the wording of the Covenant is clear in all official languages, in that it provides for a defence to be conducted in person “or” with legal assistance of one’s own choosing, thus providing the possibility for the accused to reject being assisted by any counsel. This right to defend oneself without a lawyer is, however not absolute. The interests of justice may, in the case of a specific trial, require the assignment of a lawyer against the wishes of the accused, particularly in cases of persons substantially and persistently obstructing the proper conduct of trial, or facing a grave charge but being unable to act in their own interests, or where this is necessary to protect vulnerable witnesses from further distress or intimidation if they were to be questioned by the accused. However, any restriction of the wish of accused persons to defend themselves must have an objective and sufficiently serious purpose and not go beyond what is necessary to uphold the interests of justice. Therefore, domestic law should avoid any absolute bar against the right to defend oneself in criminal proceedings without the assistance of counsel.<sup>76</sup>

38. Third, article 14, paragraph 3 (d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require, and without payment by them in any such case if they do not have sufficient means to pay for it. The gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice”<sup>77</sup> as is the existence of some objective chance of success at the appeals stage.<sup>78</sup> In cases involving capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings.<sup>79</sup> Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. Unlike in the case of privately retained lawyers,<sup>80</sup> blatant misbehaviour or incompetence, for example the withdrawal of an appeal without consultation in a death penalty case,<sup>81</sup> or absence during the hearing of a witness in such cases<sup>82</sup> may entail the responsibility of the State concerned for a violation of article 14, paragraph 3 (d), provided that it was manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice.<sup>83</sup> There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively.<sup>84</sup>

39. Paragraph 3 (e) of article 14 guarantees the right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. As an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings. Within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of article 7,<sup>85</sup> it is primarily for the domestic legislatures of States parties to determine the admissibility of evidence and how their courts assess it.

40. The right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court as provided for by article 14, paragraph 3 (f) enshrines another aspect of the principles of fairness and equality of arms in criminal proceedings.<sup>86</sup> This right arises at all stages of the oral proceedings. It applies to aliens as well as to nationals. However,



accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively.<sup>87</sup>

41. Finally, article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.<sup>88</sup> Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred,<sup>89</sup> and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.<sup>90</sup>

## VI. JUVENILE PERSONS

42. Article 14, paragraph 4, provides that in the case of juvenile persons, procedures should take account of their age and the desirability of promoting their rehabilitation. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defence; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians, unless it is considered not to be in the best interest of the child, in particular taking into account their age or situation. Detention before and during the trial should be avoided to the extent possible.<sup>91</sup>

43. States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age. It is important to establish a minimum age below which children and juveniles shall not be put on trial for criminal offences; that age should take into account their physical and mental immaturity.

44. Whenever appropriate, in particular where the rehabilitation of juveniles alleged to have committed acts prohibited under penal law would be fostered, measures other than criminal proceedings, such as mediation between the perpetrator and the victim, conferences with the family of the perpetrator, counselling or community service or educational programmes, should be considered, provided they are compatible with the requirements of this Covenant and other relevant human rights standards.

## VII. REVIEW BY A HIGHER TRIBUNAL

45. Article 14, paragraph 5 of the Covenant provides that anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different language versions (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences. The expression “according to law” in this provision is not intended to leave the very existence of the right of review to the discretion of the States parties,

since this right is recognised by the Covenant, and not merely by domestic law. The term according to law rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out,<sup>92</sup> as well as which court is responsible for carrying out a review in accordance with the Covenant. Article 14, paragraph 5 does not require States parties to provide for several instances of appeal.<sup>93</sup> However, the reference to domestic law in this provision is to be interpreted to mean that if domestic law provides for further instances of appeal, the convicted person must have effective access to each of them.<sup>94</sup>

46. Article 14, paragraph 5 does not apply to procedures determining rights and obligations in a suit at law<sup>95</sup> or any other procedure not being part of a criminal appeal process, such as constitutional motions.<sup>96</sup>

47. Article 14, paragraph 5 is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court<sup>97</sup> or a court of final instance,<sup>98</sup> following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court. Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect.<sup>99</sup>

48. The right to have one's conviction and sentence reviewed by a higher tribunal established under article 14, paragraph 5, imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case.<sup>100</sup> A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.<sup>101</sup> However, article 14, paragraph 5 does not require a full retrial or a "hearing",<sup>102</sup> as long as the tribunal carrying out the review can look at the factual dimensions of the case. Thus, for instance, where a higher instance court looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to in the appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt in the specific case, the Covenant is not violated.<sup>103</sup>

49. The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal,<sup>104</sup> also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of the right to appeal.<sup>105</sup> The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision.<sup>106</sup>

50. A system of supervisory review that only applies to sentences whose execution has commenced does not meet the requirements of article 14, paragraph 5, regardless of whether such review can be requested by the convicted person or is dependent on the discretionary power of a judge or prosecutor.<sup>107</sup>

51. The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3 (d), but at the same time also of article 14, paragraph 5, as in

such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.<sup>108</sup> The right to have one's conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.<sup>109</sup>

### VIII. COMPENSATION IN CASES OF MISCARRIAGE OF JUSTICE

52. According to paragraph 6 of article 14 of the Covenant, compensation according to the law shall be paid to persons who have been convicted of a criminal offence by a final decision and have suffered punishment as a consequence of such conviction, if their conviction has been reversed or they have been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.<sup>110</sup> It is necessary that States parties enact legislation ensuring that compensation as required by this provision can in fact be paid and that the payment is made within a reasonable period of time.

53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgement becomes final,<sup>111</sup> or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.<sup>112</sup>

### IX. *NE BIS IN IDEM*

54. Article 14, paragraph 7 of the Covenant, providing that no one shall be liable to be tried or punished again for an offence of which they have already been finally convicted or acquitted in accordance with the law and penal procedure of each country, embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal. Article 14, paragraph 7 does not prohibit retrial of a person convicted in absentia who requests it, but applies to the second conviction.

55. Repeated punishment of conscientious objectors for not having obeyed a renewed order to serve in the military may amount to punishment for the same crime if such subsequent refusal is based on the same constant resolve grounded in reasons of conscience.<sup>113</sup>

56. The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial.<sup>114</sup> Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.

57. This guarantee applies to criminal offences only and not to disciplinary measures that do not amount to a sanction for a criminal offence within the meaning of article 14 of the Covenant.<sup>115</sup> Furthermore, it does not guarantee *ne bis in idem* with respect to the national

jurisdictions of two or more States.<sup>116</sup> This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.<sup>117</sup>

## **X. RELATIONSHIP OF ARTICLE 14 WITH OTHER PROVISIONS OF THE COVENANT**

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated.<sup>118</sup> However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.<sup>119</sup>

59. In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life (article 6 of the Covenant).<sup>120</sup>

60. To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3 (g) prohibiting compulsion to testify against oneself or confess guilt.<sup>121</sup>

61. If someone suspected of a crime and detained on the basis of article 9 of the Covenant is charged with an offence but not brought to trial, the prohibitions of unduly delaying trials as provided for by articles 9, paragraph 3, and 14, paragraph 3 (c) of the Covenant may be violated at the same time.<sup>122</sup>

62. The procedural guarantees of article 13 of the Covenant incorporate notions of due process also reflected in article 14<sup>123</sup> and thus should be interpreted in the light of this latter provision. Insofar as domestic law entrusts a judicial body with the task of deciding about expulsions or deportations, the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.<sup>124</sup> All relevant guarantees of article 14, however, apply where expulsion takes the form of a penal sanction or where violations of expulsion orders are punished under criminal law.

63. The way criminal proceedings are handled may affect the exercise and enjoyment of rights and guarantees of the Covenant unrelated to article 14. Thus, for instance, to keep pending, for several years, indictments for the criminal offence of defamation brought against a journalist for having published certain articles, in violation of article 14, paragraph 3 (c), may leave the accused in a situation of uncertainty and intimidation and thus have a chilling effect which unduly restricts the exercise of his right to freedom of expression (article 19 of the Covenant).<sup>125</sup> Similarly, delays of criminal proceedings for several years in contravention of article 14,

paragraph 3 (c), may violate the right of a person to leave one's own country as guaranteed in article 12, paragraph 2 of the Covenant, if the accused has to remain in that country as long as proceedings are pending.<sup>126</sup>

64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1 providing for the independence of the judiciary.<sup>127</sup>

65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.<sup>128</sup>

### Notes

<sup>1</sup> General comment, No. 24 (1994) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 8.

<sup>2</sup> General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 15.

<sup>3</sup> Ibid, paras. 7 and 15.

<sup>4</sup> Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 15.

<sup>5</sup> General comment No. 29 (2001) on article 4: Derogations during a state of emergency, para. 11.

<sup>6</sup> Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary proceedings against a civil servant); communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition).

<sup>7</sup> Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

<sup>8</sup> Communication No. 202/1986, *Ato del Avellanal v. Peru*, para. 10.2 (limitation of the right to represent matrimonial property before courts to the husband, thus excluding married women from suing in court). See also general comment No. 18 (1989) on non-discrimination, para. 7.

<sup>9</sup> Communications No. 377/1989, *Currie v. Jamaica*, para. 13.4; No. 704/1996, *Shaw v. Jamaica*, para. 7.6; No. 707/1996, *Taylor v. Jamaica*, para. 8.2; No. 752/1997, *Henry v. Trinidad and Tobago*, para. 7.6; No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.10.

<sup>10</sup> Communication No. 646/1995, *Lindon v. Australia*, para. 6.4.

- <sup>11</sup> Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.2.
- <sup>12</sup> Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.
- <sup>13</sup> Communication No. 1347/2005, *Dudko v. Australia*, para. 7.4.
- <sup>14</sup> Communication No. 1086/2002, *Weiss v. Austria*, para. 9.6. For another example of a violation of the principle of equality of arms see communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing).
- <sup>15</sup> Communication No. 846/1999, *Jansen-Gielen v. The Netherlands*, para. 8.2 and No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, para. 7.4.
- <sup>16</sup> E.g. if jury trials are excluded for certain categories of offenders (see concluding observations, *United Kingdom of Great Britain and Northern Ireland*, CCPR/CO/73/UK (2001), para. 18) or offences.
- <sup>17</sup> Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2.
- <sup>18</sup> Communication No. 112/1981, *Y.L. v. Canada*, paras. 9.1 and 9.2.
- <sup>19</sup> Communication No. 441/1990, *Casanovas v. France*, para. 5.2.
- <sup>20</sup> Communication No. 454/1991, *Garcia Pons v. Spain*, para. 9.3.
- <sup>21</sup> Communication No. 112/1981, *Y.L. v. Canada*, para. 9.3.
- <sup>22</sup> Communication No. 779/1997, *Äärelä and Näkkäläjätvi v. Finland*, paras. 7.2-7.4.
- <sup>23</sup> Communication No. 837/1998, *Kolanowski v. Poland*, para. 6.4.
- <sup>24</sup> Communications No. 972/2001, *Kazantzis v. Cyprus*, para. 6.5; No. 943/2000, *Jacobs v. Belgium*, para. 8.7, and No. 1396/2005, *Rivera Fernández v. Spain*, para. 6.3.
- <sup>25</sup> Communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.4.
- <sup>26</sup> Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (disciplinary dismissal).
- <sup>27</sup> Communications No. 1341/2005, *Zundel v. Canada*, para. 6.8, No. 1359/2005, *Esposito v. Spain*, para. 7.6.
- <sup>28</sup> See para. 62 below.
- <sup>29</sup> Communication No. 263/1987, *Gonzalez del Rio v. Peru*, para. 5.2.
- <sup>30</sup> Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), para. 18.
- <sup>31</sup> Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, para. 9.4.

- <sup>32</sup> Communication No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.
- <sup>33</sup> Communication No. 933/2000, *Mundy Busyo et al v. Democratic Republic of Congo*, para. 5.2.
- <sup>34</sup> Communication No. 387/1989, *Karttunen v. Finland*, para. 7.2.
- <sup>35</sup> *Idem*.
- <sup>36</sup> Also see Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, art. 64 and general comment No. 31 (2004) on the *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 11.
- <sup>37</sup> See communication No. 1172/2003, *Madani v. Algeria*, para. 8.7.
- <sup>38</sup> Communication No. 1298/2004, *Becerra Barney v. Colombia*, para. 7.2.
- <sup>39</sup> Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.
- <sup>40</sup> Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
- <sup>41</sup> Communication No. 577/1994, *Polay Campos v. Peru*, para. 8.8; communication No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5.
- <sup>42</sup> Communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.
- <sup>43</sup> Communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3.
- <sup>44</sup> Communication No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1; communication No. 1126/2002, *Carranza Alegre v. Peru*, para. 7.5; communication No. 1125/2002, *Quispe Roque v. Peru*, para. 7.3; communication No. 1058/2002, *Vargas Mas v. Peru*, para. 6.4.
- <sup>45</sup> Communications No. 577/1994, *Polay Campos v. Peru*, para. 8.8 ; No. 678/1996, *Gutiérrez Vivanco v. Peru*, para. 7.1.
- <sup>46</sup> Communication No. 770/1997, *Gridin v. Russian Federation*, para. 8.2.
- <sup>47</sup> See Committee on the Elimination of Racial Discrimination, communication No. 3/1991, *Narrainen v. Norway*, para. 9.3.
- <sup>48</sup> Communications No. 273/1988, *B.d.B. v. The Netherlands*, para. 6.3; No. 1097/2002, *Martínez Mercader et al v. Spain*, para. 6.3.
- <sup>49</sup> Communication No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, para. 7.3; No. 886/1999, *Bondarenko v. Belarus*, para. 9.3; No. 1138/2002, *Arenz et al. v. Germany*, admissibility decision, para. 8.6.

- <sup>50</sup> Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.13; No. 349/1989, *Wright v. Jamaica*, para. 8.3.
- <sup>51</sup> Communication No. 203/1986, *Mũnoz Hermoza v. Peru*, para. 11.3 ; No. 514/1992, *Fei v. Colombia*, para. 8.4 .
- <sup>52</sup> See e.g. Concluding observations, *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), para. 21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), para. 16.
- <sup>53</sup> Communication No. 215/1986, *Van Meurs v. The Netherlands*, para. 6.2.
- <sup>54</sup> Communication No. 301/1988, *R.M. v. Finland*, para. 6.4.
- <sup>55</sup> Communication No. 819/1998, *Kavanagh v. Ireland*, para. 10.4.
- <sup>56</sup> Communication No. 770/1997, *Gridin v. Russian Federation*, paras. 3.5 and 8.3.
- <sup>57</sup> On the relationship between article 14, paragraph 2 and article 9 of the Covenant (pretrial detention) see, e.g. concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para. 14 and Argentina, CCPR/CO/70/ARG (2000), para. 10.
- <sup>58</sup> Communication No. 788/1997, *Cagas, Butin and Astillero v. Philippines*, para. 7.3.
- <sup>59</sup> Communication No. 207/1986, *Moraël v. France*, para. 9.5; No. 408/1990, *W.J.H. v. The Netherlands*, para. 6.2; No. 432/1990, *W.B.E. v. The Netherlands*, para. 6.6.
- <sup>60</sup> Communication No. 1056/2002, *Khachatrian v. Armenia*, para. 6.4.
- <sup>61</sup> Communication No. 253/1987, *Kelly v. Jamaica*, para. 5.8.
- <sup>62</sup> Communications No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4 and 253/1987, *Kelly v. Jamaica*, para. 5.8.
- <sup>63</sup> Communication No. 16/1977, *Mbenge v. Zaire*, para. 14.1.
- <sup>64</sup> Communications No. 282/1988, *Smith v. Jamaica* , para. 10.4; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.
- <sup>65</sup> See communication No. 451/1991, *Harward v. Norway*, para. 9.5.
- <sup>66</sup> Communication No. 1128/2002, *Morais v. Angola*, para. 5.6. Similarly communications No. 349/1989, *Wright v. Jamaica*, para. 8.4; No. 272/1988, *Thomas v. Jamaica*, para. 11.4; No. 230/87, *Henry v. Jamaica*, para. 8.2; Nos. 226/1987 and 256/1987, *Sawyers, Mclean and Mclean v. Jamaica*, para. 13.6.
- <sup>67</sup> Communication No. 1128/2002, *Márques de Morais v. Angola*, para. 5.4.



- <sup>68</sup> Communications No. 913/2000, *Chan v. Guyana*, para. 6.3; No. 594/1992, *Phillip v. Trinidad and Tobago*, para. 7.2.
- <sup>69</sup> See concluding observations, Canada, CCPR/C/CAN/CO/5 (2005), para. 13.
- <sup>70</sup> Communication No. 451/1991, *Harward v. Norway*, para. 9.5.
- <sup>71</sup> Communications No. 1117/2002, *Khomidova v. Tajikistan*, para. 6.4; No. 907/2000, *Siragev v. Uzbekistan*, para. 6.3; No. 770/1997, *Gridin v. Russian Federation*, para. 8.5.
- <sup>72</sup> See e.g. communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2 regarding a delay of 22 months between the charging of the accused with a crime carrying the death penalty and the beginning of the trial without specific circumstances justifying the delay. In communication No. 537/1993, *Kelly v. Jamaica*, para. 5.11, an 18 months delay between charges and beginning of the trial did not violate art. 14, para. 3 (c). See also communication No. 676/1996, *Yasseen and Thomas v. Guyana*, para. 7.11 (delay of two years between a decision by the Court of Appeal and the beginning of a retrial) and communication No. 938/2000, *Siewpersaud, Sukhram, and Persaud v. Trinidad v. Tobago*, para. 6.2 (total duration of criminal proceedings of almost five years in the absence of any explanation from the State party justifying the delay).
- <sup>73</sup> Communication No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2.
- <sup>74</sup> Communications No. 1089/2002, *Rouse v. Philippines*, para. 7.4; No. 1085/2002, *Taright, Touadi, Remli and Yousfi v. Algeria*, para. 8.5.
- <sup>75</sup> Communications No. 16/1977, *Mbenge v. Zaire*, para. 14.1; No. 699/1996, *Maleki v. Italy*, para. 9.3.
- <sup>76</sup> Communication No. 1123/2002, *Correia de Matos v. Portugal*, paras. 7.4 and 7.5.
- <sup>77</sup> Communication No. 646/1995, *Lindon v. Australia*, para. 6.5.
- <sup>78</sup> Communication No. 341/1988, *Z.P. v. Canada*, para. 5.4.
- <sup>79</sup> Communications No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.4; No. 964/2001, *Saidova v. Tajikistan*, para. 6.8; No. 781/1997, *Aliev v. Ukraine*, para. 7.3; No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 58.
- <sup>80</sup> Communication No. 383/1989, *H.C. v. Jamaica*, para. 6.3.
- <sup>81</sup> Communication No. 253/1987, *Kelly v. Jamaica*, para. 9.5.
- <sup>82</sup> Communication No. 838/1998, *Hendricks v. Guyana*, para. 6.4. For the case of an absence of an author's legal representative during the hearing of a witness in a preliminary hearing see communication No. 775/1997, *Brown v. Jamaica*, para. 6.6.

- <sup>83</sup> Communications No. 705/1996, *Taylor v. Jamaica*, para. 6.2 ; No. 913/2000, *Chan v. Guyana*, para. 6.2; No. 980/2001, *Hussain v. Mauritius*, para. 6.3.
- <sup>84</sup> Communication No. 917/2000, *Arutyunyan v. Uzbekistan*, para. 6.3.
- <sup>85</sup> See para. 6 above.
- <sup>86</sup> Communication No. 219/1986, *Guesdon v. France*, para. 10.2.
- <sup>87</sup> *Idem*.
- <sup>88</sup> Communications No. 1208/2003, *Kurbonov v. Tajikistan*, paras. 6.2-6.4; No. 1044/2002, *Shukurova v. Tajikistan*, paras. 8.2-8.3; No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; ; No. 912/2000, *Deolall v. Guyana*, para. 5.1; No. 253/1987, *Kelly v. Jamaica*, para. 5.5.
- <sup>89</sup> Cf. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15. On the use of other evidence obtained in violation of article 7 of the Covenant, see paragraph 6 above.
- <sup>90</sup> Communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 253/1987, *Kelly v. Jamaica*, para. 7.4.
- <sup>91</sup> See general comment No. 17 (1989) on article 24 (Rights of the child), para. 4.
- <sup>92</sup> Communications No. 1095/2002, *Gomariz Valera v. Spain*, para. 7.1; No. 64/1979, *Salgar de Montejo v. Colombia*, para. 10.4.
- <sup>93</sup> Communication No. 1089/2002, *Rouse v. Philippines*, para. 7.6.
- <sup>94</sup> Communication No. 230/1987, *Henry v. Jamaica*, para. 8.4.
- <sup>95</sup> Communication No. 450/1991, *I.P. v. Finland*, para. 6.2.
- <sup>96</sup> Communication No. 352/1989, *Douglas, Gentles, Kerr v. Jamaica*, para. 11.2.
- <sup>97</sup> Communication No. 1095/2002, *Gomariz Valera v. Spain*, para. 7.1.
- <sup>98</sup> Communication No. 1073/2002, *Terrón v. Spain*, para. 7.4.
- <sup>99</sup> *Idem*.
- <sup>100</sup> Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 985/2001, *Aliboeva v. Tajikistan*, para. 6.5; No. 973/2001, *Khalilova v. Tajikistan*, para. 7.5; No. 623-627/1995, *Domukovsky et al. v. Georgia*, para. 18.11; No. 964/2001, *Saidova v. Tajikistan*, para. 6.5; No. 802/1998, *Rogerson v. Australia*, para. 7.5; No. 662/1995, *Lumley v. Jamaica*, para. 7.3.
- <sup>101</sup> Communication No. 701/1996, *Gómez Vázquez v. Spain*, para. 11.1.

- <sup>102</sup> Communication No. 1110/2002, *Rolando v. Philippines*, para. 4.5; No. 984/2001, *Juma v. Australia*, para. 7.5; No. 536/1993, *Perera v. Australia*, para. 6.4.
- <sup>103</sup> E.g. communications No. 1156/2003, *Pérez Escolar v. Spain*, para. 3; No. 1389/2005, *Bertelli Gálvez v. Spain*, para. 4.5.
- <sup>104</sup> Communications No. 903/1999, *Van Hulst v. Netherlands*, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, para. 8.5.
- <sup>105</sup> Communication No. 662/1995, *Lumley v. Jamaica*, para. 7.5.
- <sup>106</sup> Communications No. 845/1998, *Kennedy v. Trinidad and Tobago*, para. 7.5; No. 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.3; No. 750/1997, *Daley v. Jamaica*, para. 7.4; No. 665/1995, *Brown and Parish v. Jamaica*, para. 9.5; No. 614/1995, *Thomas v. Jamaica*, para. 9.5; No. 590/1994, *Bennet v. Jamaica*, para. 10.5.
- <sup>107</sup> Communications No. 1100/2002, *Bandajevsky v. Belarus*, para. 10.13; No. 836/1998, *Gelazauskas v. Lithuania*, para. 7.2.
- <sup>108</sup> Communication No. 554/1993, *LaVende v. Trinidad and Tobago*, para. 5.8.
- <sup>109</sup> See communications No. 750/1997, *Daley v. Jamaica*, para. 7.5; No. 680/1996, *Gallimore v. Jamaica*, para. 7.4; No. 668/1995, *Smith and Stewart v. Jamaica*, para. 7.3. See also communication No. 928/2000, *Sooklal v. Trinidad and Tobago*, para. 4.10.
- <sup>110</sup> Communications No. 963/2001, *Uebergang v. Australia*, para. 4.2; No. 880/1999, *Irving v. Australia*, para. 8.3; No. 408/1990, *W.J.H. v. Netherlands*, para. 6.3.
- <sup>111</sup> Communications No. 880/1999; *Irving v. Australia*, para. 8.4; No. 868/1999, *Wilson v. Philippines*, para. 6.6.
- <sup>112</sup> Communication No. 89/1981, *Muhonen v. Finland*, para. 11.2.
- <sup>113</sup> See United Nations Working Group on Arbitrary Detention, Opinion No. 36/1999 (Turkey), E/CN.4/2001/14/Add. 1, para. 9 and Opinion No. 24/2003 (Israel), E/CN.4/2005/6/Add. 1, para. 30.
- <sup>114</sup> Communication No. 277/1988, *Terán Jijón v. Ecuador*, para. 5.4.
- <sup>115</sup> Communication No. 1001/2001, *Gerardus Strik v. The Netherlands*, para. 7.3.
- <sup>116</sup> Communications No. 692/1996, *A.R.J. v. Australia*, para. 6.4; No. 204/1986, *A.P. v. Italy*, para. 7.3.
- <sup>117</sup> See, e.g. Rome Statute of the International Criminal Court, article 20, para. 3.

<sup>118</sup> E.g. communications No. 1033/2001, *Singarasa v. Sri Lanka*, para. 7.4; No. 823/1998, *Czernin v. Czech Republic*, para. 7.5.

<sup>119</sup> Communication No. 1073/2002, *Terrón v. Spain*, para. 6.6.

<sup>120</sup> E.g. communications No. 1044/2002, *Shakurova v. Tajikistan*, para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); No. 915/2000, *Ruzmetov v. Uzbekistan*, para. 7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); No. 913/2000, *Chan v. Guyana*, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); No. 1167/2003, *Rayos v. Philippines*, para. 7.3 (violation of art. 14 para. 3 (b)).

<sup>121</sup> Communications No. 1044/2002, *Shakurova v. Tajikistan*, para. 8.2; No. 915/2000, *Ruzmetov v. Uzbekistan*, paras. 7.2 and 7.3; No. 1042/2001, *Boimurodov v. Tajikistan*, para. 7.2, and many others. On the prohibition to admit evidence in violation of article 7, see paragraphs. 6 and 41 above.

<sup>122</sup> Communications No. 908/2000, *Evans v. Trinidad and Tobago*, para. 6.2; No. 838/1998, *Hendricks v. Guayana*, para. 6.3, and many more.

<sup>123</sup> Communication No. 1051/2002 *Ahani v. Canada*, para. 10.9. See also communication No. 961/2000, *Everett v. Spain*, para. 6.4 (extradition), 1438/2005, *Taghi Khadje v. Netherlands*, para. 6.3.

<sup>124</sup> See communication No. 961/2000, *Everett v. Spain*, para. 6.4.

<sup>125</sup> Communication No. 909/2000, *Mujuwana Kankanamge v. Sri Lanka*, para. 9.4.

<sup>126</sup> Communication No. 263/1987, *Gonzales del Rio v. Peru*, paras. 5.2 and 5.3.

<sup>127</sup> Communications No. 933/2000, *Mundy Busyo et al. v. Democratic Republic of Congo*, para. 5.2.; No. 814/1998, *Pastukhov v. Belarus*, para. 7.3.

<sup>128</sup> Communication No. 202/1986, *Ato del Avellanal v. Peru*, paras. 10.1 and 10.2.

-----