THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS POST-CONFLICT

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1. Introduction

Our starting point is that effective delivery of economic, social and cultural[1] rights is an important – and underexplored – element of transitional justice and post-conflict reconstruction. The High Commissioner for Human Rights has argued strongly that the inclusion of abuses of economic and social rights within post-conflict criminal prosecutions and truth and reconciliation processes is an important element of achieving social justice[2] but one that has been largely neglected. It is our contention that failure to deliver economic, social and cultural rights through national legal frameworks in accordance with international standards undermines the sought-after stability and human security post-conflict (including food, health, gender and physical security), which in turn lessens the ability or willingness of victims and witnesses to participate in the formal processes of post-conflict justice.

International law requires States to adopt 'appropriate and effective legislative and administrative procedures' for 'fair, effective and prompt access to justice.'[3] This includes ensuring that victims of crimes perpetrated during conflict secure 'equal and effective access to justice.'[4] This depends upon the willingness of victims to testify, which requires that they receive protection to ensure their physical[5] and material[6] security. If they are unable to access employment, health services or to acquire adequate food for themselves and their families they may well regard participation in criminal proceedings – even for the trial of war crimes or crimes against humanity committed against themselves – as a luxury that they cannot afford. Violations of economic and social rights post-conflict exacerbate earlier violations creating a double injustice for victims. This reduces the possibility of successful prosecution of those who committed atrocities during the conflict and weakens the prospects for an enduring end to violence. We therefore submit that 'proper assistance' for victims who are seeking access to justice[7] includes guarantee of economic and social rights.[8] This has particular resonance for women who are frequently victims of gender-based[9] specific harms in conflict and for whom guarantee of economic and social rights is especially important.[10] We argue that this approach is in accordance with Security Council (SC) Resolution 1325 on women, peace and security (October 2000). This resolution emphasises the importance of 'involving women in all peacekeeping and peace-building measures' and the 'responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against

[1] The paper does not differentiate between economic, social and cultural rights. It also recognises that there are different short, medium and long term implications with respect to such rights as those relating to employment, social security, access to healthcare, education and the conditions for an adequate standard of living.
[2] Louise Arbour, 'Economic and Social Justice for Societies in Transition', CHRGJ, Working Paper No. 10, 2006.
[3] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 16 December 2005, article 2 (b).
[4] Ibid, articles 3 (c); 11 (a).
[5] The Declaration of Basic Principles for Victims of Crime and Abuse of Power, 1985, para. 6 (d), provides that measures should be put in place to ensure the safety of victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation.
[6] The Declaration of Basic Principles for Victims of Crime and Abuse of Power, para. 14, states that 'victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.'
[7] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, op. cit., article 12 (c).
[8] This is consistent with GA Res. S-23/2, Outcome Document, 10 June 2000, para. 15, which recognises the need for holistic support for women who have suffered all forms of abuse to ensure 'equal access to appropriate and adequate food and nutrition, clean water, safe sanitation, shelter, education, social and health services, including reproductive health care and maternity care.' The difference is that our argument is linked explicitly to access to justice.
[9] Gender-based harm is that which 'is directed against a woman because she is a woman or that affects women disproportionately.' CEDAW, General Recommendation No. 19 (1992), *Violence against Women*, para. 6.
[10] This is demonstrated by the inclusion of economic and social rights in the Convention on the Elimination of All Forms of Discrimination against Women, 1979, alongside civil and political rights.

humanity, war crimes including those relating to sexual violence against women and girls' It also calls upon States to 'adopt a gender perspective', including with reference to 'the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction.' Most recently Security Council Resolution 1820 (19 June 2008) called upon States to ensure that women and girls have 'equal protection under the law and equal access to justice'. It is our contention that the 'special needs' of Security Council Resolution 1325 and the requirements of 'equal access to justice' in Security Council Resolution 1820 necessarily encompass access to economic and social rights to make legal protection effective, as well as the basics of survival and personal rehabilitation.

Delivery of economic, social and cultural rights contributes both to an equitable allocation of public goods and services and to law enforcement by facilitating accountability for the commission of international crimes as required by the tenets of transitional justice. This is in fact no more than restating the principle of the interdependence of all human rights.[11] We argue that lack of access to economic and social rights not only impedes effective transitional justice but also creates an obstacle to participation in the institutional and social structures for reconstruction. It thus undermines the realisation of participatory democracy and the achievement of full citizenship for women. Accountability is also an over-riding interest of the international community.

Focus on economic and social rights is not to deny the importance of cultural rights. Although the focus will be on those rights contained within the International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 6-14, it is with recognition that their effective application and implementation requires that they be culturally mediated.

This paper seeks to demonstrate that economic and social rights can and should be made a core element of post-conflict settlement in pursuance of a sustainable peace based upon the rule of law. As noted by the UN Committee on Economic, Social and Cultural rights (CESCR), it would also facilitate the return home of those who had left a State during conflict,[12] or had become internally displaced. The second section of the paper identifies obstacles to the inclusion of economic and social rights in peace settlements and in post-conflict reconstruction. The inclusion of economic and social rights is especially important with respect to the security of vulnerable persons who can become marginalised by post-conflict settlements. Their frustrations may destabilise what may already be a tenuous situation. The third section therefore identifies those who might face particular vulnerabilities post-conflict and the following section lists the existing international legal obligations for the guarantee of their economic and social rights. This section emphasises that the obligation to ensure economic and social rights already exists under international law and that vulnerable peoples have special entitlements based upon their needs. The paper is not arguing for new obligations but rather for the application of existing obligations in the moment of reconstruction. In this sense explicit provision for economic and social rights within peace agreements is not required but such provision facilitates their being taken into account during policy and planning post-conflict and may minimise the likelihood of their being relegated to a subsequent phase of development. The fifth section examines existing jurisprudence to demonstrate the justiciability of economic and social rights.

This introduction has emphasised the importance of ensuring economic and social rights as part of a programme for post-conflict reconstruction but it is not intended to limit their importance to such

[11] Vienna Declaration and Programme of Action, 1993, I, article 5: 'All human rights are universal, indivisible and interdependent and interrelated.'

[12] 'The Committee calls on the State party to intensify its efforts to ensure the sustainable return of returnees to their home communities by ensuring their equal enjoyment of the Covenant rights, especially in the fields of social protection, health care and education.' (CESCR, Concluding Comments, Bosnia-Herzegovina, E/C.12/BIH/CO/1, 24 January 2006, para. 32)

situations. Indeed the jurisprudence on economic and social rights has typically not arisen in post-conflict contexts but out of situations of vulnerability such as homelessness, exploitation and ill health. This paper seeks to apply the legal standards and jurisprudence on economic and social rights to post-conflict reconstruction because that is the context in which the concept of transitional justice has been moulded. The moment of constitutional reform and social reordering that post-conflict reconstruction provides makes it useful for analytical purposes from which we can explore the usefulness of a similar approach in other situations where legal accountability is sought for wrongs committed against vulnerable people, including for international legal wrongs such as human trafficking, and where the evidence of victims and witnesses may impact upon the prosecution.

2. Obstacles to the Assertion of Economic and Social Rights Post-Conflict

There may be a number of obstacles to the inclusion of economic and social rights in post-conflict settlements. It must be recognised that the term 'post-conflict' is problematic. Peace negotiations may be undertaken from the outbreak of conflict with the primary objective of bringing an end to coercive action. These may result in some form of agreement without bringing an end to conflict and there may be many such attempts before an agreement holds. Moreover there can be no assumption that the violence stops even with a formal ceasefire. The collapse of civilian structures may mean continuing and pervasive lawlessness, although the forms and locations of violence may change. Gender-based violence may also be manifested in different forms from those experienced throughout conflict. For example studies show the prevalence of domestic violence in a supposed post-conflict environment. Another problematic concept is 'transition'. There may in fact be multiple transitions in the aftermath of conflict with different priorities asserted at different stages. For example, economic rights may be given a higher priority than social rights (and both may be subordinated to civil and political rights). Institutional and capacity rebuilding are likely to be lengthy processes and will take place in a piecemeal fashion. Economic reconstruction may involve reordering, for example through privatisation programmes that may create particular obstacles to the guarantee of economic and social rights.

The following section suggests some reasons why economic and social rights are not routinely included in post-conflict arrangements.

First, the immediate concerns of the international community, and those negotiating peace settlements, are most often bringing an end to the violence of armed conflict, stabilising the situation, embarking on Disarmament Demobilization and Reintegration (DDR), landmine and cluster bomb clearance, especially in agricultural areas, establishing effective institutions and responding to humanitarian needs. These objectives are frequently expressed through peace agreements and SC resolutions. For example SC Resolution 1272 stated that the newly established UNTAET in East Timor would have the following elements:

- To provide security and maintain law and order in East Timor;
- To establish an effective administration;
- To assist in the development of civil and social services;
- To ensure the delivery of humanitarian assistance, rehabilitation and development assistance.

While economic and social concerns are addressed in the last bullet point they are set out in terms of humanitarian assistance, not those of rights. The linkage between delivery of economic and social rights and social insecurity and survival, both as a cause of conflict and as an obstacle to sustainable peace, is insufficiently often brought into peace negotiations or the instruments agreed through such processes. This failure is captured in an Oxfam report on the El Salvador Peace Process that notes:

> Generally it was recognised that whilst the Agreements dealt in detail with issues related to the demobilisation and demilitarisation processes, limited attention was given to fundamental economic and legal issues which constituted root causes of the internal conflict.[13]

Where peace agreements have explicitly incorporated economic and social rights, as discussed below, they have not however generated the national legal frameworks for their implementation.

[13] Cited in David Keen, *The Economic Function of Violence in Civil Wars*, 1998, p. 16.

Second, and following from this, economic and social rights are perceived as appertaining to development rather than as being central to establishing political stability and security. Too often development is seen as subsidiary to political security and is addressed separately and subsequently through a donors' conference and the work of the International Financial Institutions (IFIs) rather than being integrated into a holistic approach to reconstruction.

Third, linkages between economic survival and security and pursuance of the goals of transitional justice may not be made. Countering impunity for crimes against humanity and war crimes committed during conflict may be addressed through provision for criminal proceedings (in international, hybrid, or national courts), but unless issues of access to justice, including its economic and gender dimensions, are also addressed, proceedings are likely to be hampered and the wider objectives of securing justice for victims will not be achieved. Indeed transitional justice processes may offer more to those who have been arrested and charged with crimes than to their victims as where detainees are given regular food and access to health care in the facilities of the international criminal tribunals.

Fourth, even though there has been a greater acceptance of the importance of the inclusion of human rights provisions within peace agreements,[14] greater space is typically accorded to civil and political rights. This may be attributed to the lesser juridical status accorded to economic and social rights compared with political and civil rights, especially within the USA, which is often a lead player/mediator in peace negotiations.[15] Economic and social rights may be discounted as incapable of immediate application, as lacking in coherent and precise content, and as resource dependent.[16] Ideologically they are perceived as being about social policy, benefits and welfare rather than accepted as legal entitlements; inadequate application tends to be viewed as social injustice not as rights violations. These evaluations lead some to conclude that economic and social rights are inherently non-justiciable,[17] that is they are neither suited for, nor capable of, judicial determination and assessment. The growing jurisprudence on economic and social rights makes this position untenable but there remains a perceived problem 'relating to the legal nature of social and economic rights [that] does not relate to their validity but rather to their applicability.'[18] Nevertheless the ideology that accords priority to civil and political rights remains strong. This paper seeks to challenge this viewpoint by emphasising the importance of ensuring economic and social rights to post-conflict participatory democracy and transitional justice.

Fifth, national legislative and judicial machinery may not be available for the implementation of legal obligations relating to economic and social rights whether they are set out in general treaties or specified in peace agreements. Priority in capacity and institution building has generally been accorded to other sectors such as physical security or electoral machinery rather than to social and economic security. Accordingly greater experience has been developed in the former sectors. Even

[14] Christine Bell, *Peace Agreements and Human Rights*, 2000.
[15] The USA is not a party to any of the international human rights treaties that include economic and social rights, for example the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, or the American Convention on Human Rights. An extreme position is that social and economic rights lack the legal quality of rights, which are understood as traditional civil and political rights such as the right to life, to freedom from torture, liberty, fair trial.
[16] These characteristics are seen in ICESCR, article 2 which states: 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'
[17] For arguments against the institution of a complaints mechanism under an Optional Protocol to the ICESCR see M. Dennis and D. Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?', 98 AJIL (2004) 462.
[18] M. Scheinin, 'Economic and Social Rights as Legal Rights', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights,* 2nd ed. 2001, p. 29.

where assertions are made of the applicability of economic and social rights, attention may not be given to the development of mechanisms necessary for their delivery. For example in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ observed that Israel is bound by the provisions of the ICESCR and stated that 'it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities' (para. 112). This provides no indication as to the legal or other machinery that is required to satisfy those obligations, or of the consequences of failure to do so, despite some reference to the denial of such rights (para. 130-4). The UN Human Rights treaty bodies have been of more assistance in this regard and reference will be made to the General and Concluding Comments that have fleshed out the legal requirements.

Sixth, there are obstacles to the delivery of economic and social rights in post-conflict situations. One issue is the range of legal structures that may be agreed (or imposed) in the immediate aftermath of conflict. Recent events have seen the introduction of an international administration by peace agreement (Bosnia) or by Security Council resolutions (Kosovo, East Timor), belligerent occupation (Iraq 2003-4) and handover to a local administration with international assistance (Afghanistan). Competence may be divided between central government and federal entities (Bosnia-Herzegovina). International human rights law bestows responsibility for guarantee of rights upon States but the central authority may have little *de jure* or *de facto* authority over a sub-state entity in this regard.

There is no single model of allocation of authority or competence but rather a mix of international and local actors who are accountable to different bodies. In addition, as previously stated these diverse legal arrangements do not necessarily mean the end of violence. The presence of multiple international and regional agencies without clarification of the duty-holders or allocation of responsibilities may create operational obstacles to ensuring economic and social rights. There may also be contextual obstacles such as cultural attitudes towards women (and other groups), or the continuation post-conflict of gender-based violence against women that is related to the conflict but is discounted by authorities as irrelevant to reconstruction. In an uncertain and unpredictable environment there may be an unwillingness to challenge such attitudes, again especially where there is no assigned responsibility to do so.

3. Post-Conflict Vulnerabilities

In any post-conflict context there will be certain groups that are especially vulnerable in the sense that they may be marginalised from the mainstream settlement and be susceptible to poverty and other forms of harm. Failure to identify the vulnerabilities experienced by some groups at this time (and cultural particularities that heighten such vulnerabilities) may lead to their exclusion from active participation in political and governmental bodies, including those involved in post-conflict policy and decision-making about the allocation of resources. The denial of social justice such exclusion may entail has the potential for destabilising any post-conflict regime and thus undermining sustainable development that depends upon progressive realisation of economic and social rights for all.[19] People who consider they have not been accorded a stake in societal reconstruction are unlikely to support it and may resume (or support) hostilities. This creates a pragmatic reason for governments, including newly established governments, to ensure inclusion of all such groups. The CESCR has stated that '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.'[20] Similarly in the context of economic sanctions it has asserted that '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.'[21]

Vulnerabilities will vary according to context and may impact upon different peoples and in diverse ways in the evolving post-conflict environment. People who may be especially vulnerable at this time include the following:

- Victims of gross violations of human rights;
- Ethnic, religious and racial minorities;
- Groups subject to discrimination;
- Indigenous persons;
- Internally displaced persons;
- Refugees;
- Former combatants, including women combatants;
- Children and young persons;
- Non-nationals, including those who have lost nationality through the conflict;
- Persons living in rural areas;
- Elderly persons;
- Sick, wounded or persons with disabilities;
- Persons lacking legal documentation, for example property deeds, proof of nationality, or legal status;
- Migrants;
- Trafficked persons;
- Human rights defenders, civil society activists seeking human rights.

In some cases vulnerable groups are identified by a peace agreement. For example the Nepal Peace Agreement identifies 'women, Dalit, indigenous people, Janajatis, Madheshi, oppressed, neglected,

[19] GA Res. 41/128, 4 December 1986, Declaration on the Right to Development, article 1: 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.' See also article 8.
[20] CESCR, General Comment No. 3 (1990), *The nature of States parties obligations,* para. 12.
[21] CESCR, General Comment No 8 (1997), *The relationship between economic sanctions and respect for economic, social and cultural rights,* para. 14.

minorities and the backward … discrimination based on class, caste, language, sex, culture, religion, and region.'[22]

The Liberian Peace Agreement states in Article XXXI, 1a, that '[T]he NTGL shall accord particular attention to the issue of the rehabilitation of vulnerable groups or war victims (children, women, the elderly and the disabled) within Liberia, who have been severely affected by the conflict in Liberia.'[23]

The Great Lakes peace process concluded separate Protocols on Women and Children victims of sexual violence, internally displaced persons (IDPs) and returning persons, each of which identifies particular legal obligations for the protection of members of these groups.

Where particular vulnerabilities have not been identified and addressed within any peace settlement it is incumbent upon the relevant authorities to do so. Nor should it be assumed that any list contained within a peace agreement is comprehensive and attention should be given to identification of other vulnerable persons who may have been silenced or marginalised by the processes. It should also be remembered that people who have survived atrocities are likely to have suffered trauma and may be experiencing post trauma stress syndrome, which may impact upon their ability to express their needs.

Despite separate itemisation, categories of vulnerable people are not exclusive and individuals may well come within two or more of them, requiring analysis of how different and multiple vulnerabilities intersect. Women within all categories may face different and additional hardships and obstacles stemming from legal, social, cultural and practical considerations.[24] Some women are especially vulnerable for reasons other than their belonging to an otherwise vulnerable group, for example pregnant women, women with young children, female heads of household.

This approach is supported by the human rights treaty bodies which have identified particular vulnerabilities and have indicated the need for targeted measures to address them. For example the Concluding Comments of CEDAW to *Azerbaijan* dated 2 February 2007:

> 32. The Committee urges the State party to implement targeted measures for refugee women and girls and internally displaced women and girls, within specific timetables, to improve access to education, employment, health and housing and to monitor their implementation.

CEDAW, Concluding Comments to the *Philippines* dated 25 August 2006:

> 29. The Committee expresses its concern about the precarious situation of rural and indigenous women, as well as the Muslim women in the autonomous region of Muslim Mindanao, who lack access to adequate health services, education, clean water and sanitation services and credit facilities. The Committee is also concerned about women's limited access to justice in cases of violence, especially in the conflict zones, and the lack of sanctions against the perpetrators of such violence. The Committee is furthermore concerned that the practice of early marriage is persistent among Muslim women.

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[22] Comprehensive Peace Agreement held between the Government of Nepal and the Communist Party of Nepal (Maoist), 2006.

[23] Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties, Accra, 18 August 2003.

[24] The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007, para. 2, C: 'Structural and administrative obstacles in all forms of justice, which impede or deny women's and girls' access to effective and enforceable remedies, must be addressed to ensure gender-just reparation programmes.'

> 30. The Committee calls upon the State party to pay special attention to the needs of rural women, indigenous women and Muslim women living in the autonomous region of Muslim Mindanao, ensuring that they have access to health care, social security, education, clean water and sanitation services, fertile land, income-generation opportunities and participation in decision-making processes. The Committee recommends that the State party ensure women's access to justice through the provision of legal aid and take steps to prosecute the perpetrators of violence against them.

These statements also illustrate the interconnectedness of all economic and social rights and the need for an integrated approach to their realisation.

CEDAW has also recognised the particular vulnerabilities caused by conflict, for example in its Concluding Comments to *Angola* dated 18 August 2004:

> 148. While recognizing the efforts undertaken by the State party aimed at the reconstruction of the country and its socio-economic fabric after the long years of armed conflict, including repatriation, rehabilitation and resettlement of refugees and internally displaced persons, the majority of whom are women, the Committee is concerned that the widespread poverty among women and the poor socio-economic conditions are among the causes of the violation of women's human rights and discrimination against them. The Committee is especially concerned about the situation of women in rural areas, women heads of households, women refugees and internally displaced women returning to their places of origin or migrating to the cities, who often lack access to health, education, services and means and opportunities for economic survival.

A strong statement of the continuing vulnerability of women who have survived sexual violence in conflict is made by CEDAW in its Concluding Comments to *Bosnia-Herzegovina* dated 2 June 2006:

> 37. The Committee is concerned at the situation of victims of sexual violence of the 1992-1995 armed conflict, most of whom are women, who may suffer from additional disadvantages as female heads of household and internally displaced persons. The Committee is concerned that they and their specific type of suffering are not sufficiently recognized in the respective legal frameworks for civilian war victims in both entities. The Committee is also concerned that there is no coherent strategy to support these women and they have only limited or no access to health insurance and financial benefits, as well as to general health services or specific health services relating to their traumatic experiences. The Committee is also concerned at the pending threat of eviction from their accommodations in the Federation of Bosnia and Herzegovina of women who are civilian victims of sexual violence and internally displaced persons.
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> 38. The Committee urges the State party to explicitly recognize and adequately protect women who were civilian victims of sexual violence during the armed conflict through a State law as well as through the allocation of financial resources for adequate social provisions for them, including health insurance and housing, so that their rights and entitlements are guaranteed in the entire State party at a level comparable to that applicable to military victims of war. It also urges the State party to review its current regulations and plans on accommodation issues for women who are civilian victims of war and displaced persons in order to prevent additional forms of indirect discrimination.

Many of the Committee's expressed concerns relate to lack of access to economic and social rights (social security, health services, evictions, lack of shelter). While they are not linked directly to the ability or willingness of women to testify in proceedings against perpetrators of sexual violence and

other war crimes or crimes against humanity the remarks are consistent with this concern. While commitment to the concept of gender-mainstreaming throughout all post-conflict processes may be formally expressed by governments or international personnel, there may be a failure to understand or to take seriously the concept. The position of women will be given particular attention throughout the discussion.

It is also important that people are not simply labelled as 'vulnerable' and identified only in terms of their perceived vulnerabilities and needs. A core argument in this paper is that delivery of economic and social rights is a post-conflict obligation which must be respected by those who assume positions of authority to facilitate the exercise of agency by conflict survivors in procedures for transitional justice and in personal and social reconstruction. Relief from the immediate demands for food, shelter and health needs creates space for survivors to speak for themselves and to take charge of their own concerns and for survivor groups to come together in joint action.

4. Major Areas of Concern for those made Vulnerable Post-Conflict

Accountability and an end to impunity for human rights violations have been argued to be essential to social reconstruction, reconciliation and the possibility of sustainable peace. Successful prosecutions of perpetrators depend upon the willingness of victims to testify in legal proceedings. Victims' rights movements have emphasised the need for security for victims and witnesses particularly through the trial process. The International Criminal Court (ICC) Statute, article 68, is the most advanced formal prescription for the protection of victims during proceedings. However the need for security extends beyond this to include protection from reprisals and social stigmatisation and provision for material security, which may especially affect members of the vulnerable groups identified above.

Factors that undermine material security post-conflict and which may prevent victims from coming forward to offer evidence and to testify in court include:

- Poverty;
- Unemployment;
- The need to acquire food;
- The need to acquire shelter;
- Ill health and lack of access to adequate health care;
- The need to care for sick and wounded family members;
- Child care needs, including the need to escort children to schools;
- Seeking education;
- Illiteracy (especially where education may have been suspended during hostilities);
- Lack of transport;
- Uncertainty about legal status;
- Lack of awareness of international standards.

While many members of the population may experience these hardships post-conflict discrimination in post-conflict policies and programmes may exacerbate them for specific ethnic, religious and national groups, indigenous peoples and women. For example, priority in employment, healthcare and education may be afforded to former combatants, or to particular groups within society thereby excluding others.

Particular people may face further hardships:

- Non nationals may fear deportation, harassment by police or other officials;
- IDPs and those returning home may face issues of title to property that has been occupied during their absence;
- Those who remained within a conflict zone and occupied abandoned property may face eviction by people returning home.

Gender-based issues facing women:

- As explained by CEDAW in its Concluding Comments to Bosnia-Herzegovina, harms caused to women in conflict are often not perceived as 'military injuries' and provision for their health care is not accorded priority or is reduced;
- Priority provision for former combatants (for example to employment, health care and education) is a form of indirect discrimination that may restrict access to these services for women non-combatants;

- Women's status as combatant or non-combatant and thus as entitled to provisions directed at assisting the reintegration of former combatants may be controversial, for example, women who were abducted and subsequently carried out various functions within the abducting forces, including both domestic tasks and military acts;
- Even where recognised as such, former women combatants may nevertheless face discrimination where assistance for former combatants excludes women combatants;
- Former women combatants may also face social exclusion because they are perceived as having violated social norms;
- Women's legal status may be controversial, for example women who were abducted and became 'bush wives' may be considered as having been married and thus as having consented to sexual intercourse with their 'husband', or alternatively they may be considered as victims of detention and rape; the legal (and personal) situation may be more complex where there are children of the relationship, for example with respect to property rights;
- The adverse affects of wartime gender-based violence including the physical, mental and social consequences of rape and other forms of sexual violence;
- The adverse consequences of displacement including loss of documentation;
- Discriminatory laws that prevent women from inheriting, owning, occupying or accessing land and other forms of property;
- Discriminatory laws that prevent women's access to loans and credit, either absolutely or in the absence of a male guarantor;
- Discrimination against women-headed households and women without male relatives, exacerbated by grieving for dead or disappeared male relatives; lawyers may not have been trained in anti-discrimination law and be unable to challenge discriminatory laws and practices;
- Domestic violence that is perceived as personal and not as an aftermath of conflict, for example that committed by returning former combatants;
- Lack of appropriate or informed institutional responses to gender-based violence against women, including administrative and social agencies that are not trained in domestic violence and the unavailability of shelters; even where the issue is recognised it is not given social priority, for example in reconstruction of security forces, the judiciary and law enforcement agencies;
- Continuing public and criminal violence serving to justify keeping women and girls within the house 'for their own security' and thus restricting their access to public life, employment (including within the informal economy) and education;
- Extremist elements within society seeking to (re)assert (often through violent means) cultural restrictions upon women, for example with respect to movement, employment, dress codes, an insistence that women be accompanied in public by male family members; these may effectively deny women access to employment and education opportunities and health care services;
- Familial or community-based violence may be directed against women who are deemed to have transgressed social norms during the conflict, for example by becoming combatants, who are perceived as having collaborated, or who have been subject (or are suspected of having been subject) to sexual abuse, including women detainees;
- Failure by those responsible for policy and decision-making to take account of the gendered aspects of human rights, for example the right to health or freedom of movement and expression.

These circumstances contribute to women's economic poverty and material insecurity and thus vulnerability to being trafficked. Begging and prostitution, which may be resorted to as a means of redressing poverty, create further vulnerability to violence and trafficking. Transition from the

violence of conflict to other forms of political violence such as that associated with organised crime also threatens women's security post-conflict and adds to their vulnerability.

Local conditions and context must be taken into account when assessing priorities and caution should be exercised not to make assumptions about the obstacles facing women, or the appropriate responses. For example, cultural attitudes may create obstacles for women in the ways suggested above but may also offer some solutions. When seeking to devise strategies for the implementation of economic, social and cultural rights the relevant authorities (national or international) should neither reject nor unquestioningly accept alleged cultural norms. Instead they should take account of cultural conditions and consider the four questions posed by Rao:[25]

> First, what is the status of the speaker? Second, in whose name is the argument from culture advanced? Third, what is the degree of participation in culture formation of the social groups primarily affected by the cultural practices in question? Fourth, what is culture anyway?

The need is to identify the extent to which individuals have entitlements under international law, in particular human rights law, with respect to addressing these vulnerabilities and giving effect to equality before the law (CEDAW, article 15). This requires categorisation of the applicable obligations and the duty holders.

[25] A. Rao, "The Politics of Gender and Culture in International Human Rights Discourse", in J. Peters, and A. Wolper (eds.), *Women's Rights, Human Rights: International Feminist Perspectives,* New York, Routledge, 1995, p. 167 and 168.

5. International Legal Obligations for Economic, Social and Cultural Rights

5.1 Treaty obligations

International Treaties

- UN Charter, article 1 (3), 55 and 56;
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966;
- Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1965, article 5 (e);
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, articles 10, 11, 12, 14;
- Convention on the Rights of the Child (CRC), 1989, especially articles 22-30;
- Convention on the Human Rights of Migrant Workers and their Families (ICRMW), 1990;
- Convention Relating to the Status of Refugees (RC), 1951;
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV), 1949;
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (P I), 1977;
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (P II), 1977;
- Rome Statute of an International Criminal Court (ICC), 1998, articles 43 (6), 68;[26]
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2000;
- ILO Conventions, especially Equal Remuneration Convention, 1951; Social Security (Minimum Standards) Convention, 1952; Discrimination (Employment and Occupation) Convention, 1958; Equality of Treatment (Social Security) Convention, 1962; Indigenous and Tribal Peoples Convention, 1989;
- Convention on the Rights of Persons with Disabilities (ICRPD), 2006.

Regional Treaties

- European Social Charter (ESC), 1961, as revised 1996;
- Inter-American Convention on Human Rights (IACHR), 1969, article 26;
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 1988;
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para), 1994;
- African Charter on Human Rights and Peoples' Rights (AfCHR), 1981, especially articles 15, 16, 17;
- African Charter on the Rights and Welfare of the Child (AfCRWC), 1990;
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (PRWA), 2003;
- SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 5 January 2002;

[26] An important aspect of the development of international criminal law through the ad-hoc tribunals and the ICC is the clarification of international standards to be applied in criminal proceedings within national courts. A major advance at Rome was the inclusion within the ICC Statute of obligations on the Registry (article 43) and Court (article 68) to provide protection for the security – including the psychological well-being and dignity – of victims and witnesses. National courts should take similar steps when faced with trials involving similar charges.

- Convention on Action in Trafficking in Human Beings, Council of Europe, 2005.

Some of these treaties are general and apply to all persons[27] (for example ICESCR; IACHR; AfCHR) while others apply to specific categories of persons who have been identified as requiring focused rights (for example ICERD; CEDAW; CRC; ICRMW; RC; Palermo Protocol; AfCRWC; PRWA). The specialised treaties should be read in conjunction with the general human rights treaties. Some general treaties also make provision for specific groups; for example: ICCPR, article 27 (persons belonging to minorities); CEDAW, article 14 (rural women); CRC, article 22 (refugee children), article 30 (children belonging to minorities or indigenous children), article 39 (children victims of neglect, torture or armed conflict); ESC, Part II, article 7 and 17 (children and young persons), article 15 (persons with disabilities), article 19 (migrant workers and families), article 23 (elderly persons).

5.2 Soft Law on Economic and Social Rights and MDGs

- Universal Declaration on Human Rights (UDHR), 1948, especially articles 22-26;
- UN World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993;
- International Conference on Population and Development, Cairo, 5-13 September 1994;
- Fourth United Nations World Conference on Women, Beijing Declaration and Platform for Action (Beijing Platform for Action), 15 September 1995;
- Gender Equality, Development and Peace for the 21st Century, Special Session of the General Assembly, 5-9 June 2000, GA Res. S-23/3, 10 June 2000 (Outcome Document, Beijing +5);
- ILO Declaration on Fundamental Principles and Rights at Work, Geneva, 1998;
- The Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 (Annex);
- The Declaration of Basic Principles for Victims of Crime and Abuse of Power, 1985 (Declaration Victims of Crime);
- The Code of Conduct for Law Enforcement Officials, GA Res. 34/169, 1979, article 6;
- General Assembly Declaration on the Right to Development, GA Res. 41/128, 4 December 1986;
- General Assembly Declaration on the Elimination of Violence against Women, GA Res. 48/104, 20 December 1993;
- Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Report of the 30th Session of the Committee on World Food Security (CFS), Supplement, FAO Doc. CL 127/10-Sup.1, Annex 1 (2004), especially Guidelines 13 and 14;
- Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines), 22-26 January 1997;
- Quito Declaration on the Enforcement and Realization of Economic, Social and Cultural Rights in Latin America and the Caribbean, 24 July 1998;
- Millennium Development Goals, 2000;
- Montréal Principles on Women's Economic, Social and Cultural Rights, 26 *Human Rights Quarterly* (2004) 760;

[27] That is all persons who are within the jurisdiction of the relevant treaty, as specified within the treaty. See F. Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights', in F. Coomans and M. Kamminga, *The Extraterritorial Application of Human Rights Treaties,* 2004, p. 183.

- Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 16 December 2005;
- Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro principles), UN Doc E/CN.4/Sub.2/2005/17, 2005;
- The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007;
- General Assembly Declaration on the Rights of Indigenous Peoples, A/RES/61/295, 13 September 2007.

Security Council Resolution

- Security Council Resolution 1325, 2000, *Women, peace and security,* reaffirms 'the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts.'
  Paragraph 8 '*calls* on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction; … and paragraph 11 '*emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls.'

SC Resolution 1325 was not adopted under UN Charter chapter VII and is not formally binding. However it builds upon commitments made at the Fourth World Conference in Beijing 1995, and was adopted by consensus. It is an important statement about the inclusion of women and women's concerns in post-conflict situations. The inclusion of 'human rights law' does not differentiate between civil and political or economic and social rights, the 'special needs' of women post-conflict include access to economic and social rights and there is a strong assertion of the need to prosecute war crimes and crimes against humanity that will not be achieved without the active participation of women victims and witnesses.

5.3 Delegated Soft Law

- UN Human Rights treaty bodies, General Comments and Recommendations;
- UN Human Rights treaty bodies, Concluding Comments and Observations;
- Reports of UN Commission on Human Rights (now Human Rights Council);
- Special Rapporteurs on Health, Education, Housing, Right to Food, Violence against Women;
- Independent Expert on Economic Reform.

5.4 Peace Agreements

Some peace agreements have made specific mention of economic and social rights, for example:

- Agreement on Social and Economic Aspects and Agrarian Situation concluded on 6 May 1996 between the Presidential Peace Commission of the Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca*, article 13: 'To this end, the Government undertakes to take the specific economic and social situation of women into account in its development strategies, plans and programmes, and to train civil servants in analysis and planning based on this approach. This undertaking includes the following:

> Recognizing the equal rights of women and men in the home, in the workplace, in the production sector and in social and political life, and ensuring that women have the same opportunities as men, particularly with regard to access to credit, land ownership and other productive and technological resources.'

Subsequent provisions address education and training, housing, health, labour and social security. They are not termed as entitlements and the CESCR has regretted the 'insufficient progress made by the State party towards the effective implementation of the Peace Agreements of 1996 … which have led to persistent serious problems, such as violence at the national level, intimidation, corruption, impunity and lack of constitutional, fiscal, educational and agrarian reforms. All these have impacted adversely on the full realization of economic, social and cultural rights enshrined in the Covenant, particularly with regard to indigenous peoples.'[28]

- The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6, article 1, includes the right to property and the right to education in the enumerated rights; the Appendix on Human Rights Agreements includes the ICESCR, RC, ICERD, CEDAW, CRC and ICRMW but does not include the European Social Charter. Only the European Convention on Human Rights – a civil and political rights convention – was incorporated into domestic law.

- The Comprehensive Peace Agreement held between the Government of Nepal and the Communist Party of Nepal (Maoist), article 3.9: 'To adopt policy to establish rights of all citizens in education, health, housing, employment and food reserve'; article 3.10: 'To adopt policy to provide land and other economic protection to landless squatters, Kamaiya, Halia, Harwa, Charwa and economically backward section.' Article 7.5 lists economic and social rights to food security, health, education, private property and social security. Article 7.6 provides for protection of the 'rights of the women and children in a special way, to immediately stop all types of violence against women and children, including child labour as well as sexual exploitation and abuse.'

- The International Conference on the Great Lakes Region, especially the Protocol on the Property Rights of Returning Persons and the Protocol on Good Governance, article 27, recognises eradication of poverty as integral to good governance. States parties 'undertake to provide for the essential needs of their populations and to improve the delivery of essential services.' The Protocol specifies various ways through which this should be achieved, including laws and policies to promote employment, the development of the social sector and ensuring an equitable distribution of resources and incomes. These all relate to economic and social rights but are not presented as such. Other factors listed relate more explicitly to economic policy, for example promoting foreign investment.

Treaties are binding upon those States that have become parties to them. Accordingly, even if a peace agreement or Security Council resolution relating to post-conflict is silent with respect to human rights, the relevant States remain bound by those treaties to which they are parties. This may include the State to which the peace agreement applies and other States involved in the negotiation process. In some instances States become parties in the aftermath of conflict. For example Afghanistan acceded to CEDAW in March 2003. In addition States are bound by those human rights that have become customary international law.

[28] CESCR, Concluding Comments, E/C.12/1/Add.93, 12 December 2003.

6. Economic and Social Rights for Vulnerable Groups

6.1 Non-discrimination

The principle of non-discrimination is spelled out in all human rights instruments. The Inter-American Court of Human Rights has asserted it to constitute a peremptory norm:

> Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.[29]

The principle of non-discrimination in the guarantee of economic and social rights is spelled out in the ICESCR, article 2(2). Non-discrimination is required to ensure equality between all individuals that is substantive not merely formal equality. It requires equality in the allocation and distribution of Covenant rights. The ICCPR, articles 2 (1) and 26, prohibits discrimination on the basis of sex. Article 2 (1) prohibits discrimination with respect to Covenant rights while article 26 is a 'free-standing' equality clause. The importance of the latter for the protection of economic and social rights is illustrated by the UN Human Rights Committee opinion in *Zwaan-de Vries v. the Netherlands*.[30] The Netherlands denied Mrs. Zwaan de Wries long-term unemployment benefits because she was not the family 'breadwinner'. In contrast married men could receive unemployment benefits even if their wife was the principal income earner or breadwinner. The Human Rights Committee held that ICCPR, article 26 provides that all persons are entitled to equal protection of the law without any discrimination. This protection is not limited to the rights contained in the ICCPR and applies also to the socio-economic domain. All legislation should be non-discriminatory. There was a violation of article 26 because the legislation required married women to meet a condition that did not apply to married men. There were no objective or reasonable criteria justifying this differential treatment and the legislation was therefore discriminatory. The ICESCR, article 3, spells out that parties 'undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights' in the Covenant. Article 3 is a cross-cutting obligation and applies to all of the rights stated in Articles 6 to 15 of the Covenant. It requires addressing gendered 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.[31]

Non-discrimination in economic and social life and with regard to the allocation of economic and social resources is crucial for women for inequality in this regard impacts upon their enjoyment of a range of human rights, including access to paid employment, political participation, and equality before the law. CEDAW thus includes economic and social rights as well as civil and political rights. CEDAW's article 3 is a general provision that requires States parties to 'take in all fields, in

[29] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, Inter-Am. Ct. H.R. (Ser. A), No. 18 (2003), para. 101.
[30] Communication No. 182/1984, CCPR/C/29/D/182/1984, 1987; see also *SWM Brooks v the Netherlands,* Communication No. 172/1984, CCPR/C/29/D/172/1984, 9 April 1987.
[31] CESCR, General Comment No. 16 (2005), para. 22.

particular in the political, social, economic and cultural fields, all appropriate measures, including legislation to ensure the full development and advancement of women.' Other articles provide more specifically for equality between women and men in economic and social life: education (article 10); employment (article 11); healthcare (article 12); family benefits and access to credit (article 13). Discrimination in the allocation of and access to these rights undermines personal development (as indicated in CEDAW, article 3) and while equal distribution is a step towards the wider achievement of equality: 'A vital way in which equality guarantees are underpinned is by ensuring that basic social protections for the most vulnerable are secured, such as housing, food and education.'[32]

Discrimination is defined in CEDAW, article 1 as '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.'

This definition is read into the ICCPR by the Human Rights Committee, General Comment No. 18 (1989), *Non-discrimination*, and into the ICESCR by CESCR, General Comment No. 16 (2005), *The equal right of men and women to the enjoyment of all economic, social and cultural rights*, para. 11. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is somewhat broader: 'Discrimination against women' means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

These definitions include direct discrimination (purpose) and indirect discrimination (result). For example, priority accorded to former combatants in access to employment, health and education while non-discriminatory on its face constitutes indirect discrimination against women where the majority of former combatants were men. In applying the non-discrimination provision of the Revised European Social Charter, 1996 (Part Three, article E), the European Committee of Social Rights stated that it prohibits both direct discrimination and indirect discrimination. It explained that indirect discrimination includes 'failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.'[33] This reasoning supports the proposition that women victims of crime face particular gender-based hurdles in accessing justice and failing to ensure that they are supported appropriately to enable their participation in criminal proceedings is a form of indirect discrimination.

Stereotyping and prejudice based upon assumptions of the inferiority of either sex is another form of discrimination that States are required to take steps to eliminate (see CEDAW, article 5; PRWA, article 2 (2)).

Rebecca Cook has urged an approach that supports giving special attention to those who are especially vulnerable. She urges focus on disadvantage, that is 'a law or policy that maintains or aggravates the disadvantage of a persistently disadvantaged group is discriminatory.' This perspective 'requires judges to look at women as they function in the real world to determine

[32] C. McCrudden, 'Equality and Discrimination', in D. Deldman (ed.), *English Public Law*; OUP, 2004, chapter 11, p. 588.
[33] *Autisme-Europe v France*, complaint no 13/2002, 7 November 2003, para 52.

whether women's abuse or deprivation of power is due to their place in a sexual or gender hierarchy.'[34]

Where women are members of groups disadvantaged for other reasons (for example because of race, ethnicity, age, sexuality) they may face multiple and intersecting discriminations. CERD General Recommendation No. 25 on the Gender Related Dimensions of Racial Discrimination provides a methodology for analysis of the intersectionality of race and sex-based discriminations. It requires a 'comprehensive gender analysis … of the effects of gender, the effects of race and the effects of gender and race combined.' CERD suggested a four-fold inquiry:[35]

- First the form or nature of the violation should be identified;
- Second, the inquiry should consider the circumstances or context of the violation to determine the practical or legal situations in which gender-based race discrimination or racially-based gender discrimination occurs;
- Third, the consequences of violation must be examined;
- Fourth, there is a need to ask how the availability and accessibility of remedies and complaint mechanisms are affected by issues of race and gender.

This methodology can be applied to other forms of (multiple) discrimination and may be especially important post-conflict where focus on particular groups may obscure wider discrimination.

CEDAW, article 2 requires a policy of eliminating discrimination against women to be pursued 'without delay' and more specifically with respect to economic and social rights in articles 10, 11, 12, 13 and 14. Similarly, in its General Comment No. 3 the CESCR has asserted that unlike economic and social rights subject to progressive realisation, non-discrimination is an obligation of immediate applicability. CESCR General Comment No. 16 states that 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.' The Revised European Social Charter requires that Charter rights 'shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.' There is no mention of 'progressive realisation'.

The Beijing + 5 Special Session of the General Assembly favoured a two pronged approach that focuses both on gender equality and women's empowerment through such measures as equal access to education, health and social services, enhanced employment opportunities and participation in decision-making and management.[36] The Outcome Document states that:

> Programme support to enhance women's opportunities, potential and activities need to have a dual focus : on the one hand, programmes aimed at meeting the basic as well as the specific needs of women for capacity-building, organizational development, empowerment, and on the other gender mainstreaming in all programme formulation and implementation activities (para. 62).

The international prohibition of discrimination requires States to 'improve the de facto position of women through concrete and effective policies and programmes.'[37] This requires States to undertake the following steps:

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[34] R. Cook, 'State Responsibility for Violations of Women's Human Rights', 7 *Harvard Human Rights Journal* (1994) 126, 156.
[35] The same methodology is used in: UN Office of the High Commissioner for Human Rights, *Gender Dimensions of Racial Discrimination,* Geneva, August 2001.
[36] GA Res. S-23/2, Outcome Document, 10 June 2000, para. 52, 55 and 58.
[37] CEDAW, General Recommendation No. 25 (2004), para. 8.

- Ensure a framework for non-discrimination in national law and policy (CEDAW, article 2);
- Take steps to eliminate gender (and other) stereotypes and prejudice, for example with respect to appropriate employment for women post-conflict, to women's participation in public life (CEDAW, article 5 (1));
- Develop gender disaggregated data and statistics, for example with respect to demographic change post-conflict; numbers and status of former women combatants; rates of childbirth during and immediately after conflict; numbers of young people; numbers of female headed households; numbers of girls enrolled in and actually attending schools; criminal justice statistics including prosecution and conviction rates for gender-based violence; and numbers of women prisoners and reasons for their detention;
- Identify health care needs of particular vulnerable people, including gender-specific health (level of HIV positive women; infant mortality rates; nutrition needs); CEDAW General Recommendation No. 24, para. 6 states 'special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women, refugee and internally displaced women, the girl child and older women, women in prostitution, indigenous women and women with physical or mental disabilities'[38];
- Gender-based violence against women constitutes discrimination and contributes to other forms of discrimination (CEDAW General Recommendation No. 19); States are required to exercise due diligence to prevent, investigate, prosecute and punish gender-based violence against women that occurs post-conflict;
- The inclusion into peace agreements of international instruments relating to gender-based violence (The General Assembly Declaration on the Elimination of Violence against Women, 1993; CEDAW General Recommendation No. 19 (1992), *Violence against women*; and where applicable the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994, and PRWA, 2003).

Some instruments prohibit discrimination against specific groups beyond those listed in the ICESCR, article 2 (2), for example:

- IDP, Principle 1;
- Declaration on the Rights of Indigenous Peoples, article 2.

Other provisions identify those within vulnerable groups who require additional assistance because of further vulnerabilities:

- IDP, Principle 4 (2) identifies certain IDPs 'such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons' who shall be entitled to protection required by their condition;
- AfCHR, article 18 (4) guarantees for the aged and disabled 'the right to special measures of protection in accordance with their physical or moral needs';
- PRWA, article 22 (special protection 'commensurate with their physical, economic and social needs' for elderly women); article 23 (special protection 'commensurate with their physical, economic and social needs' for women with disabilities); article 24 (protection for poor women, women heads of families, including women from marginalized population groups).

[38] C.f. Quito Declaration on the Enforcement and Realization of Economic, Social and Cultural Rights in Latin America and the Caribbean, 24 July 1998, para. 29(a): 'the State's obligation extends to the adoption of special measures … for women, vulnerable groups and historically unprotected groups.'

Such special treatment is not discriminatory treatment that violates the principle of equality as it is needed to ensure equality. The Permanent Court of International Justice asserted as long ago as 1935 that the principle of equality under international law encompasses 'equality in fact'. This 'may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'[39], that is, objectively unequal situations should not be treated equally. CEDAW too prohibits both formal *(de jure)* discrimination and substantive *(de facto)* discrimination, requiring equality of results. The principle of substantive discrimination has been upheld by the European Court of Human Rights, for example in *Thlimmenos v Greece* the Grand Chamber stated that:

> The Court has so far considered that the right under [ECHR] Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification … However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[40]

Accordingly, as the CESCR explained with respect to people 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.'[41]

Some peace agreements also recognise the need for some form of affirmative action, for example the Great Lakes Agreement, Protocol on Good Governance, Article 2 (j), *The equality of men and women*, including through affirmative action policies.

These statements about the legal requirements of non-discrimination support the proposal for identification of 'persons whose situations are significantly different' in the post-conflict environment and taking targeted measures to ensure their equality in access to social and economic entitlements at that time.

6.2 Temporary Special Measures

The notion of affirmative action leads to the question of temporary special measures. Temporary special measures are provided for under a number of international human rights treaties for the purpose of redressing disadvantage.[42] For example CEDAW, article 4 allows for the adoption of temporary special measures that are 'aimed at accelerating de facto equality between men and women' (see also the Convention on the Elimination of Racial Discrimination, article 1 (4) and the Convention on the Rights of Persons with Disabilities, article 5). Such measures are not considered discriminatory within the terms of the various conventions. CESCR General Comment No. 16 (2005), paragraph 15, explains that:

> 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

[39] *Minority Schools in Albania,* Adv Op, PCIJ, Ser A/B, No 64 (1935).
[40] Appl. No. 34369/97, 6 April 2000, para. 44.
[41] CESCR, General Comment No. 5 (1994), *Persons with disabilities,* para. 9.
[42] Compare the understanding of discrimination based on disadvantage above.

> 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.

CESCR General Comment No. 16 cross references to CEDAW, article 4, in its footnote 14. This is important for bringing CEDAW's more advanced thinking on temporary special measures into the ICESCR and thus the applicability of temporary special measures to economic and social rights. In its General Recommendation No. 5 (1988) CEDAW recommended that States 'make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.' CEDAW returned to temporary special measures in 2004. General Recommendation No. 25 emphasises the importance of continuous monitoring of laws, policies and programmes to ensure their equal application to women and men, in terms of result. This includes the implementation of post-conflict programmes to ensure their delivery of benefits to women as well as men.

Accordingly, temporary special measures may be introduced as a tool to provide economic and social rights to victims of atrocities and human rights violations to ensure access to justice and *de facto* equality before the law as stipulated by CEDAW, article 15. The content of temporary special measures should be determined by reference to the particular context: what is most needed in the immediate/medium term. This may be immediate access to basic economic and social rights for example adequate, accessible and appropriate shelter, social security, immediate and very specific health care needs (for example to victims of torture, rape and sexual violence) and food. Their provision may assist victims in determining whether to testify. Such provision is provided for with respect to trafficked persons (Palermo Protocol, article 6 (3)) and children who have been abused, tortured or exploited (CRC, article 39); its extension to all vulnerable persons post-conflict is both logical and required by the interests of justice.[43] More long term permanent legislative changes may be needed in other areas, for example to enable access to property, to make changes to the law of inheritance, or to allow access to courts.

The assumption of temporary special measures is that they will be removed once 'the objectives of equality of opportunity and treatment have been achieved' (CEDAW, article 4). The duration of a temporary special measure should be determined by reference to its 'functional result in response to a concrete problem.' In the context of post-conflict transitional justice the concrete problem is exclusion from participation in decision and policy-making about reconstruction, including from proceedings (as victims and witnesses) for the prosecution of those responsible for the commission of crimes during the conflict. However this should not assume immediate cessation of temporary special measures at the end of proceedings but rather their continuance to ensure sustainability.

[43] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, article 10: 'Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.'

6.3 Non-Derogability of Economic and Social Rights

There are no clauses in the UN Conventions guaranteeing economic and social rights (ICESCR, CEDAW, CRC, ICERD, ICRMW) allowing for derogation in a state of emergency, although derogation is provided for under the Revised European Social Charter, 1996, article F. Any such derogation must be limited to what is 'strictly required by the exigencies of the situation' and must not be 'inconsistent with [the State's] other obligations under international law.' Whether a State may derogate from its obligations under the Convention where there is no permissive derogation clause is not absolutely certain. However in *Media Rights Agenda v Nigeria* the African Commission affirmed that the lack of any derogation clause in the Africa Charter on Human and Peoples' Rights means that 'limitations on the rights and freedoms … cannot be justified by emergencies or special circumstances.'[44]

The CESCR has also emphasised on a number of occasions the non-derogability of the relevant rights:

- CESCR, General Comment No. 14, *Highest attainable standard of health*: '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' (para. 47);
- CESCR, General Comment No. 15, *The right to water*: 'A State party cannot justify its non-compliance with the core obligations set out … which are non-derogable' (para. 40).

States have made fewer and less sweeping reservations to the ICESCR than they have to CEDAW. In particular States with an adherence to Sharia law that have made significant reservations to CEDAW have not always made similar reservations to the ICESCR[45] and must therefore be considered bound by the latter, including its requirement of non-discrimination in the application of Covenant rights. It is also noticeable that States have made relatively few reservations to the CEDAW articles relating to economic and social rights.

6.4 Economic and Social Rights are Entitlements and Non-Negotiable

Delivery of economic, social and cultural entitlements must not be made dependant upon the victim cooperating with the police or other government agency. The Council of Europe, Convention on Action in Trafficking in Human Beings, 2005 offers a model in article 12 (6) which requires that assistance to victims of trafficking should not be made conditional on willingness to act as a witness.

6.5 Positive Obligations

The international instruments, as developed through case law, impose positive obligations upon States to ensure the enjoyment of human rights. In the landmark case of *Velasquez Rodriguez v. Honduras*[46] the Inter-American Court of Human Rights interpreted the IACHR, article 1 ('states parties undertake to respect … and to ensure' the convention rights) to encompass positive State action to prevent human rights violations and to investigate and punish them when they occur. The European Court of Human Rights has also asserted positive obligations in a number of cases. In *Airey v. Ireland*[47] it held that the protection of human rights must not be theoretical or illusory, but practical and effective and accordingly required the State to take positive action to ensure their enjoyment, in this case legal aid provision to enable a woman to seek a judicial separation. In *X and*

[44] In contrast the ESC, Part V, Article F allows for derogation in time of war or public emergency.
[45] See annex for some significant reservations with respect to women's economic and social rights.
[46] 28 *International Legal Materials* (1989) 294.
[47] 32 ECHR (ser. A) 1979.

Y v. The Netherlands[48] the Court again held that the protection of human rights imposed positive obligations on States, in this case to amend the criminal law to provide a remedy for a mentally disabled girl who had been abused. In *Z and others v. UK*[49] the UK was found to be in breach of the ECHR, article 3, through the failure of social service agencies to protect children from ill treatment by their parents. The Court asserted that States parties to the ECHR were 'bound to ensure that individuals within their jurisdiction were not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable people and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.' In *E v. UK*[50] four children were physically and sexually abused by WH who was cohabiting with their mother. The Court found the UK to be in violation of ECHR, article 3 through the failure of the local authority to protect them from abuse. It held that the social services should have been aware of WH's history of abuse and the pattern of behaviour including lack of investigation, communication and co-operation with the relevant authorities must be regarded as having had a significant influence on the course of events.

These cases impose positive obligations to secure civil and political rights but the same principle applies to secure economic and social rights, especially for vulnerable persons as noted in these cases. The CESCR has developed the concept of positive obligations through its model of multilayered State obligations: the obligations to respect, protect and fulfil rights. It has explained this typology through its General Comments. General Comment No. 16 (2005), *The equal right of men and women to the enjoyment of all economic, social and cultural rights,* explains the different levels of obligation in the context of non-discrimination against women.

The obligation to respect human rights is what is often called the negative State obligation: the State must not intrude in a way that interferes directly or indirectly with an individual's pursuit of their economic and social rights. Nor must it make matters worse, for example by prohibiting self-help measures without providing alternatives. Where people have no other means of securing basic economic and social provision (or where they have been destroyed by conflict) they will have recourse to own resources, such as by constructing temporary shelters, moving into empty buildings, finding patches of bombed-out ground for growing food, establishing food stalls etc. If the State seeks to put an end to such self-help measures, for example for post-conflict redevelopment, it must provide adequate alternatives and ensure that people are not put into a position of greater deprivation. Guarantee of economic and social rights does not entail treating individuals solely as victims and ignoring their own agency for positive change in their lives. Formal State intervention should not trample upon the informal measures so often adopted in the aftermath of the collapse of State institutions. At the same time self-help measures do not relieve the State (or international community) from their own obligations: what is required is working together for the effective fulfilment of rights.

The obligation to respect human rights also requires States to ensure that their policies do not have unseen or unintended adverse consequences for women. '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.'[51]

The obligation to protect: '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

[48] 91 ECHR (ser. A) (1985).
[49] *Z and others v. UK*, ECHR (GC), 10 May 2001.
[50] App. No. 33218/96, judgment of 26 November 2002.
[51] CESCR, General Comment No. 16 (2005), para. 18.

men and women to enjoy all human rights and the prohibition of discrimination of any kind; the adoption of legislation to eliminate discrimination … ; the adoption of administrative measures and programmes, as well as the establishment of public institutions, agencies and programmes to protect women against discrimination.'[52]

The obligation to fulfil (or provide): '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.' The obligation to fulfil incurs a duty that 'requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.'[53] This includes explicitly the obligation '[T]o 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.'[54]

Other General Comments reiterate and explain these obligations in particular contexts, for example CESCR, General Comment No. 18, *The right to work*, No. 15, *The right to water*, No. 14, *The right to the highest attainable standard of health,* No. 13*, The right to education* and No. 12, *The right to adequate food.* Other human rights bodies have adopted the same model, for example CEDAW, General Recommendation No. 24, *Women and Health*.

The typology can be applied to different groups within the population that are identified as vulnerable in the aftermath of conflict so that officials should ask what is needed at each stage to respect, protect and fulfil children's health, or that of the elderly, or of legal and illegal immigrant populations, or of prisoners, the disabled or any other vulnerable group. In this way appropriate matrices of the State's obligations with respect to each right and in accordance with the needs of diverse vulnerable groups can be constructed.

6.6 Progressive Realisation of Rights

The obligation upon States under ICESCR, article 2 is to take steps to the maximum of available resources for the progressive achievement of the Covenant rights. It might therefore be argued that adequate resources are not available for immediate post-conflict implementation of economic and social rights and that in any case this is not required by the Covenant. In response it should be noted that the CESCR has explained in its General Comment No. 3, para. 9 that article 2 'imposes an obligation to move as expeditiously and effectively as possible' towards the Covenant's objective. Further 'any deliberately retrogressive measures …would require the most careful consideration.' This is compatible with the obligation of conduct (as distinct from the obligation of result) described by the CESCR in its General Comment No. 3 and which is an accepted concept of international law. Coupled with the availability of temporary special measures, the State's obligation is to move forward and there is no exception whereby any backward steps could be justified by the conflict. It should also be noted that other international treaties do not make economic and social rights subject to resource availability or to progressive realisation and thus assume their immediate application, for example the AfCHR, the PRWA and the European Social Charter.

Some rights require some form of immediate response. As discussed above the obligation of non-discrimination is to be pursued 'without delay.' CESCR General Comment No. 12, *The right to adequate food*, para. 6, provides that 'States have a core obligation to take the necessary action to mitigate and alleviate hunger … even in times of natural or other disasters.' 'Other disasters' includes conflict and thus post-conflict.

[52] CESCR, General Comment No. 16 (2005), para. 19.
[53] Maastricht Guidelines, para. 6.
[54] CESCR, General Comment No. 16 (2005), para. 21.

In its Concluding Comments to States' reports the CESCR has noted where conflict has hampered the State's ability to implement economic, social and cultural rights but without stating that this justifies non implementation, or even delayed implementation.[55] The Committee also noted to Bosnia-Herzegovina its 'deep concern' that returnees after conflict 'in particular those belonging to ethnic minorities, are often denied access to social protection, health care, school education for their children and other economic, social and cultural rights, thereby impeding their sustainable return to their communities.'[56] Other points of concern relevant to the implementation of the ICESCR post-conflict were 'the discrepancy between the significant budget allocations for financing the pensions of military victims of war and the comparatively low resources allocated to social protection' and the absence of a coherent strategy to support victims of sexual violence suffered during the armed conflict of 1992-1995 and that Entity laws pertaining to civilian war victims are gender-insensitive and provide inadequate social protection for victims of sexual violence.'[57]

6.7 Minimum Core Obligations

The CESCR has asserted that it 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.'[58] The CESCR continues that a State cannot attribute failure to meet its minimum core obligations to a lack of available resources unless it can '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.' The CESCR has also stressed the non-derogability of core obligations, as discussed in 6.3 above, and that they are not subject to progressive implementation (see section 6.6 above).

The CESCR has developed further the minimum core obligation with respect to certain rights. For example in the case of the right to food the obligation is to 'take the necessary action to mitigate and alleviate hunger … even in times of natural or other disasters.'[59] With respect to health the core obligations include:[60]

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.

Similarly CESCR, General Comment No. 18 states that core obligations with respect to the right to work require:

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;

[55] For example: Bosnia-Herzegovina, E/C.12/BIH/CO/1, 24 January 2006; Serbia, E/C.12/1/Add.108, 23 June 2005; Guatemala, E/C.12/1/Add.93, 12 December 2003.
[56] Bosnia-Herzegovina, E/C.12/BIH/CO/1, 24 January 2006, para. 12.
[57] Ibid, para. 18-19.
[58] CESCR, General Comment No. 3 (1990).
[59] CESCR, General Comment No. 12 (1999).
[60] CESCR, General Comment No. 14 (2000).

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.

The Revised European Charter differentiates between 'hard core' rights and other rights.[61] Hard core rights include the right to work (article 1), the right to social security (article 12), and the right to social and medical assistance (article 13). Article 13 states that parties undertake 'to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.'

These provisions make it clear that there is a minimum standard that must be achieved. It should also be remembered that resources are made available by the international community post-conflict, typically through bilateral and multilateral donor agreements. The ICESCR, article 2, affirms the role of 'international assistance and co-operation' in implementation of the Covenant. The issue is one of allocation of political priorities rather than that of lack of resources – typically preference being accorded to those relating to civil and political rights. The CESCR in its General Comment No. 3, paragraph 12, asserts 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.'[62]

We argue that the concept of minimum core obligation requires those responsible to show as a matter of priority that they have sought to satisfy such 'minimum core obligations', especially with respect to the most vulnerable in the post-conflict situation.

6.8 Standards for Economic and Social Rights

The CESCR has spelled out the standards that a State must meet to comply with its obligations. The State must ensure facilities for delivery of economic and social rights are accessible, acceptable, appropriate, affordable, and adequate:[63]

- Spatially, temporally and physically. For example information about health or other social services must be accessible, taking into account social and cultural factors such as women's higher rate of illiteracy, restrictions on mobility due to child care and other caring responsibilities, lack of transport, security concerns post-conflict, displacement etc. To be accessible information must be made available in the languages of immigrant populations, or in non-written form. Temporality includes reference to the particular conditions prevailing post-conflict and thus requires assessment of accessibility, availability, adequacy and appropriateness in that context.

- Ethically and culturally. For example if health care facilities or other agencies can only be accessed by going through military check points, or at times allowed by military officials they are neither acceptable nor appropriate.

[61] The Revised European Economic Charter has a complex system of determining States' obligation. States parties must consider themselves bound by at least six out of Part II, articles 1, 5, 6, 7, 12, 13, 16, 19 and 20 ('hard core' articles) and by further articles which the State may select, 'provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles or sixty-three numbered paragraphs' (Part Three, Article A).
[62] The CESCR supported this proposition by reference to the UNICEF analysis 'Adjustment with a human face: protecting the vulnerable and promoting growth', the UNDP *Human Development Report 1990,* and the World Bank's *1990 World Development Report.*
[63] For example, CESCR, General Comment No. 4 (1991), *The Right to adequate housing*; see also the preliminary report of the Special Rapporteur on the right to education, UN Doc E/CN.4/1999/49, 13 January 1999, and subsequent reports.

Remedies, including legal remedies must also be accessible, available, affordable and appropriate. These criteria should be satisfied throughout an individual's life cycle[64] so that attention must be given to ensuring the different accessibility needs of the elderly, of adolescents, and of migrant workers. This might require different transport arrangements, different opening hours (outside school hours and when adolescents can attend without parental supervision or after the closure of factories) and to attend to particular obstacles at different times of life.

[64] The life cycle approach has been widely accepted. See for example GA Res. S-23/2, Outcome Document, 10 June 2000, para. 72 (e) which requires ensuring 'universal and equal access for women and men, throughout the life cycle, to social services related to health care, including education, clean water, safe sanitation, nutrition, food security and health education programmes.'

7. Justiciability of Economic, Social and Cultural Rights

Although the absence of an individual complaints mechanism under the ICESCR has prevented the development of any jurisprudence by the CESCR, there is a growing jurisprudence on economic and social rights from regional human rights bodies and some national jurisdictions, which dispels the myth of non-justiciability of economic and social rights.[65]

The ICESCR makes no provision for remedy but the CESCR has asserted the importance of individuals having access to national courts or other appropriate bodies to seek remedies for violations of the Covenant. In its General Comment No. 3, *The nature of States parties obligations* (1990), the CESCR did not refer to remedies. However in General Comment No. 9 (1998), *The domestic application of the Covenant*, it asserted that **'**whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary' and that 'there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.'

In the context of particular rights the CESCR has spelled out this conviction, see for example:

- General Comment No. 4*, The right to adequate housing*: *'*component elements of the right to adequate housing are at least consistent with the provision of domestic legal remedies';
- General Comment No. 12, *The right to food*: 'The incorporation in the domestic legal order of international instruments recognizing the right to food, … 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';
- General Comment No. 14, *The right to an adequate standard of health*: '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';
- General Comment No. 15, *The right to clean water*: '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';
- General Comment No. 18, *The right to work*: '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.'

In comparison with civil and political rights the jurisprudence on economic and social rights is limited and in its Concluding Comments to States' reports the CESCR consistently regrets the lack of case law on the Covenant. However the Concluding Comments themselves provide a further opportunity for the treaty monitoring bodies to explain their understanding of States' obligations with respect to economic and social rights.

Nevertheless in some judicial and quasi-judicial proceedings decision-makers have offered policy guidance to governments with respect to their human rights obligations and practical assistance in operationalising economic and social rights. Unsurprisingly this jurisprudence tends to focus on the plight of disadvantaged or vulnerable groups, making the principles generalisable to other such groups.

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[65] "Thus the argument of non-justiciability of ESC rights can no longer be legitimately sustained in international law", M. Baderin and R. McCorquodale, 'The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development', in M. Baderin and R. McCorquodale, *Economic, Social and Cultural Rights in Action*, OUP, 2007, p. 12.

This section considers some of the jurisprudence from international, regional and national bodies. It is by no means exhaustive but rather seeks to show how different bodies have determined whether States are complying with their obligations with respect to economic, social and cultural rights, especially in the context of vulnerable persons.

7.1 Economic and Social Rights before the International Court of Justice (ICJ)

The ICJ has asserted the applicability of human rights obligations in a situation of military occupation. In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[66] the ICJ asserted the applicability of the ICESCR in Occupied Palestinian Territory. It also stated that Israel 'is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities' (para. 112). Relevant provisions (see para. 130) include the right to work (articles 6 and 7); protection and assistance accorded to the family and to children and young persons (article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (article 11); the right to health (article 12); the right to education (articles 13 and 14).

7.2 Economic and Social Rights within Regional Human Rights Bodies[67]

7.2.1 African Commission on Human and Peoples' Rights

The *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*[68] case was brought by two NGOs on behalf of the Ogoni people. The allegations arose out of oil production by the Nigerian government and in particular activities of the Nigerian National Petroleum Development Company, in conjunction with Shell. It involved allegations of violations of the African Charter provisions on both civil and political and economic and social rights including the right to life (article 4); right to property (article 14); right to health (article 16); right to housing (read into article 18 (1) as constituent to the duty to protect the family); right to food (read into articles 4, 16 and 22).

The actions complained of included environmental harm through contamination and disposal of toxic waste and repressive action by the State security forces that killed civilians, attacked and burned villages, houses and animals. Ogoni leaders were also executed by the Government.

In finding the Nigerian government in violation of the AfCHR, the African Commission analysed State obligations through the multi-layered typology of respect, protect and fulfil. It added a further layer: to promote.

> **Respect**: the State should refrain from interference in the enjoyment of all fundamental rights.
>
> **Protect**: entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.

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66 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004, ICJ Reports (Adv Op).

67 See Part Three, M. Baderin and R. McCorquodale, *Economic, Social and Cultural Rights in Action*, OUP, 2007, where detailed accounts are given of the application of economic, social and cultural rights within the African, Inter-American and European human rights systems.

68 African Commission on Human Rights Communication 155/96 (2001).

Promote: the State must ensure that individuals are able to exercise their rights, for example, by promoting tolerance, raising awareness, and even building infrastructures.

Fulfil: a positive expectation on the part of the State to move towards the actual realisation of rights. 'It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).'

The Commission also asserted that 'sometimes, the need to meaningfully enjoy some of the rights demands a concerted action from the State in terms of more than one of the said duties' (para. 48).

This case shows:

- The linkages between civil and political and economic and social rights;
- Analysis of the multilayered obligations upon the State to respect, protect, promote and fulfil economic and social rights by a quasi-judicial body, indicating what the State should have done to comply with its obligations;
- The spoliation of the territory and treatment of civilians was not unlike what takes place in conflict;
- The Ogoni people are a vulnerable group calling upon human rights entitlements for protection;
- The African Commission read into the African Charter implicit rights to housing and to food;
- The African Commission welcomed the opportunity 'to make clear that there is no right in the African Charter that cannot be made effective' (para. 68);
- Under the AfCHR, all economic and social rights are expressed in terms of immediate obligation, not progressive realisation.

Purohit and Moore v Gambia[69] concerned especially vulnerable persons, those suffering mental disability. The applicants claimed successfully that the legal regime under the Mental Health Acts in The Gambia violated the right to enjoy the best attainable state of physical and mental health (AfCHR, article 16) and the right of the disabled to special measures of protection in keeping with their physical and moral needs (AfCHR, article 18(4)). The Commission stated that 'enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind' (para. 80). Mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance, consistent with article 18(4) and the UN Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care. The Commission stated its awareness 'that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, [… it] read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.'

This case illustrates:

- The applicability of economic and social rights to the most vulnerable;

[69] African Commission on Human and Peoples' Rights, Communication 241/2001, 15-29 May 2003.

- That poverty and lack of resources do not remove the obligation to take 'targeted' steps towards implementation. Such targeted steps may be most appropriate post-conflict;
- The assertion that realisation of economic and social rights such as the right to health is crucial to the enjoyment of all human rights.

7.2.2 Inter-American Court and Commission of Human Rights

In *Aloeboetoe et al. v Suriname*[70] the Inter-American Court of Human Rights ordered the State to open a school and medical facilities as part of the remedy for violations of the rights of the Maroons (Bushnegroes). The Court's reasoning was that the compensation ordered, which included an amount for minor children to continue their education, would not be realised unless the order was made. It seems that such an order was within 'letter and spirit' of the ACHR which provides for progressive realisation of economic and social rights in article 26. The case is especially interesting as it has elements of post-conflict justice – the violations incurred were attacks and beating with rifle-butts and bayonet wounds inflicted by a group of soldiers. On this basis we could argue similarly that access to justice is a right that will not be achieved if the State does not fulfil its obligations with respect to economic and social rights.

In *Juridical Conditions and Rights of Undocumented Migrants*,[71] the Court explained the vulnerable position of migrants who experience a power differential with respect to nationals or residents. 'This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.' Vulnerabilities are worsened by differences of language, custom and culture (para. 112-3). The Court emphasised that 'the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment' (para. 134). The State's duty of due diligence means that it 'should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards' (para. 148).

In *Dilcia Yean and Violeta Bosica v Dominican Republic*[72] two girls born in the Dominican Republic of Haitian immigrant mothers were denied birth certificates necessary to prove that they were citizens of the Dominican Republic. Without such birth certificates they were unable to enrol in school. The Inter-American Commission considered the case under the Declaration on the Rights and Duties of Man, article XII (right to education) and the American Convention on Human Rights, article 19 (rights of the child). It held that the Government had deprived the petitioners of their right to education under article XII by discriminatorily depriving them of their legal identity under domestic law. Under IACHR, article 19, as informed by the Convention on the Rights of the Child, the State is obliged to provide special protections to children, including preventing economic and social degradation. Article 19 obligations include the right to education as education gives rise to the possibility of children having a better standard of living and contributes to the prevention of unfavourable situations for the child and for society itself. The Government violated article 19 by not extending such protections to Dominican children of Haitian descent and by taking actions which denied the petitioners the most basic rights of citizenship, including education.

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[70] Inter-Am. Ct. H.R. (Ser. C) No. 15, 1993. 'The Court believes that, as part of the compensation due, Suriname is under the obligation to reopen the school at Gujaba and staff it with teaching and administrative personnel to enable it to function on a permanent basis as of 1994. In addition, the necessary steps shall be taken for the medical dispensary already in place there to be made operational and reopen that same year.'

[71] Adv Op, OC-18/03, 17 September 2003, Inter-Am. Ct HR, (Ser. A) No. 18, 2003.

[72] Report 28/01, Case 12.189, 2001.

This opinion could have significant implications for the post-conflict situation where children born during the conflict could lack documentation.

7.2.3 European Committee of Social Rights

There are a number of significant decisions from the Committee empowered to consider collective complaints under the revised European Social Charter (ESC).

ERRC v Bulgaria complaint no. 31/2005, 18 October 2006:

The Committee has considered the right to housing (ESC, articles 16 and 31): article 16 provides for the right of housing as part of the right of the family to social, legal and economic protection. This requires States to promote the provision of an adequate supply of adequate housing for families, including with provision of essential services (for example heating and electricity). This includes protection from unlawful eviction.[73] Temporary shelter is not adequate housing and individuals should be provided with housing within a reasonable period. The State must take the 'legal and practical measures which are necessary and adequate to the goal of the effective protection of the right.' States have a margin of appreciation and in balancing the general interest and rights of a specific group choices must be made in terms of priorities and resources. Nevertheless 'when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources.' Thus there are three criteria: reasonable timeframe; measurable progress; and financing consistent with the maximum use of available resources (para. 35-36). Further, where there is a vulnerable group (in this instance the Roma[74]) equal treatment requires measures appropriate to the group's circumstances to prevent them as a vulnerable group from becoming homeless (para. 41). Failure to take into account their specific situation or to take measures specifically aimed at improving their housing conditions, including the possibility of effective access to social housing could constitute a violation (para. 41).

International Federation of Human Rights Leagues (FIDH) v France, complaint no. 14/2003, 3 November 2004:

The claim was that France was in violation of ESC, article 13 (right to medical assistance) by ending the exemption of illegal immigrants with very low incomes from charges for medical and hospital treatment. FIDH also submitted that a 2002 Legislative Reform restricting access to medical services for children of illegal immigrants violated article 17 (the rights of children and young persons). Such children had to wait three months to qualify for medical assistance, and were only accorded assistance in 'situations that involve an immediate threat to life.' The Committee drew upon the Vienna Convention on the Law of Treaties, 1969, to support a purposive interpretation of the ESC so as to give life and meaning to fundamental social rights. Restriction on rights should be read narrowly. The Committee also emphasised that the Charter was complementary to the European Convention on Human Rights. 'The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights' (para. 27). The Committee stated that the circumstances of this particular case went to a right of fundamental importance to the individual, connected to the right to life and going to the dignity of the human being. Stating that human dignity is the fundamental value of positive European human

[73] See *ERRC v Greece*, complaint No 15/2003, 8 December 2004.
[74] The CESCR noted with 'deep concern' that informal settlements where Roma lived prior to armed conflict had been destroyed and no adequate alternative accommodation or compensation had been provided and that pre-armed-conflict tenants had been evicted from their homes without being provided with adequate alternative accommodation or compensation. Concluding Comments, Bosnia-Herzegovina, E/C.12/BIH/CO/1, 24 January 2006, para 25.

rights law and that health care is a prerequisite for the preservation of human dignity, the Committee concluded that 'legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter' (para. 32). However since illegal immigrants could access some forms of medical assistance after three months of residence, while all foreign nationals could at any time obtain treatment for 'emergencies and life threatening conditions' there was no violation of article 13. There was a violation of article 17, even though children had similar access to healthcare as adults. The Committee noted that Article 17 was inspired by the UN Convention on the Rights of the Child and that it protects in a general manner the right of children and young persons to care and assistance.

This case illustrates:

- Issues of delivery of economic and social rights to especially vulnerable persons – illegal immigrants and children;
- The use by decision-makers of a range of international legal instruments to complement and consolidate statements of legal obligation.

Autisme-Europe v France, complaint no. 13/2002, 7 November 2003:

The complainant alleged that the French Government's inadequate educational provision for autistic persons violated the ESC, for example the obligation to ensure the effective exercise by persons with disabilities of their right to independence, social integration and participation in the life of the community by taking the necessary measures to provide such persons with education (article 15 (1)), the obligation to secure the right to education of all children and young persons (article 17 (1)), and the principle of non-discrimination in the enjoyment of Charter rights (article E). It emphasised that States parties are obliged to take both legal and practical action to give full effect to Charter rights. When the achievement of a right is exceptionally complex and particularly expensive to resolve, State parties must take measures which allow them to achieve the objectives of the Charter 'within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings' (para. 53). Since the numbers of autistic children being educated in either general or specialist schools were disproportionately low in comparison to other children, and there was a chronic shortage of care and support facilities for autistic adults, France was in violation of articles 15 (1) and 17 (1) whether read alone or in conjunction with Article E.

This case gives particular attention to:

- 'Groups with heightened vulnerabilities';
- The assertion about how families bear the burden when the State fails in its obligations is especially significant for women (although this is not stated) who remain those primarily responsible for caring responsibilities.

7.3 Economic and Social Rights within National Courts

National courts in a number of States have applied economic and social rights.[75] Perhaps especially influential has been the analysis of economic, social and cultural rights by the Supreme Court of

[75] See Y. Gai and J. Cottrell, *Economic, Social and Cultural Rights in Practice*, 2004, which contains 'significant decisions' from a number of African states, the Americas, Asia, Europe, and the Pacific.

India, the Constitutional Court of Colombia and the Constitutional Court of South Africa. Courts can and do address public policy issues and offer practical guidance to governments relating to the implementation of rights. This section looks only at some of the key decisions of the South African Constitutional Court because the Constitutional Bill of Rights includes guarantees of labour relations (s 23); property (s 25); housing (s 26); health care, food, water and social security (s 27); education (s 29) in language modelled on that of the ICESCR. Cases such as *Minister S v. Baloyi (Minister of Justice and Another Intervening),* SA CC, 2000, show the importance of the inclusion of Constitutional protection with respect to judicial protection against violence against women.

Soobramoney v. the Minister of Health (SA CC, 1997): The appellant had chronic renal failure requiring regular renal dialysis, without which he would shortly die. He was refused treatment at the State hospital because he did not meet the criteria for admission under guidelines, which the hospital had implemented because of a shortage of resources. He claimed that his constitutional right to emergency medical treatment construed with the right to life required the hospital to provide ongoing and free treatment and that the State had to provide the necessary financial resources. The Constitutional Court rejected his claim recognizing the reality that rights, such as the right to health, are limited by lack of resources. It explained that the requirement that no-one be refused emergency medical treatment is phrased negatively, that is it applies to treatment urgently needed to be given to avert harm in the case of an emergency or sudden unforeseeable catastrophe. It does not include ongoing treatment of chronic illness for the purpose of prolonging life. Healthcare needs must be seen in the light of the population at large and the demands on the services. What is all important is that the hospital has guidelines, including budgetary allocations that are reasonable, non-discriminatory, made in good faith and are applied fairly and rationally.

The Government of South Africa v. Grootboom (SA CC, 2000): Mrs. Grootboom was one of a group of 510 children and 390 adults living in appalling circumstances in an informal settlement. They were forcibly evicted from land that they had illegally occupied, which had been earmarked for low-cost housing and their possessions were destroyed. They settled on a sports field and in an adjacent community hall. The Court emphasised that the civil and political and economic and social rights contained in the South African Bill of Rights are inter-related and mutually supporting. Without food, clothing or shelter people are denied their human dignity, liberty and equality: 'The right of access to adequate housing can thus not be seen in isolation.' It accepted that the government cannot immediately provide shelter for all those without accommodation but issued a declaratory order requiring the government to 'devise and implement' within its available resources a comprehensive and coordinated programme progressively to realize the right of adequate housing. The programme must 'provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations.' The CESCR Committee has recognised the need for flexibility, for example in not expecting a government to build or finance all housing itself but should explore ways of developing private sector contributions. A government should however make every effort to ensure that a fair share of resources is used to make low-cost housing available to the most disadvantaged and vulnerable. Such housing should also be appropriate to the particular needs of disadvantaged persons, for example the elderly and the disabled.[76] Innovation in ensuring participation by those affected in the design and implementation of housing policies is also urged.[77]

Khosa v Minister of Social Development (SA CC, 2004) concerned citizens of Mozambique who had permanent resident status in South Africa. They challenged legislation that limited entitlement

[76] See also Committee on Economic, Social and Cultural Rights, General Comment No. 5 (1994), *Persons with disabilities*, para. 33; Committee on Economic, Social and Cultural Rights, General Comment No. 6 (1995), UN Doc. E/C.12/1995/16, *The Economic, Social and Cultural Rights of Older Persons*, para. 32-33.
[77] Committee on Economic, Social and Cultural Rights, Concluding Observations to the Report of the Dominican Republic, UN Doc. E/C.12/1994/15, para. 25.

to social grants for the aged to South African citizens, and prevented children of non-South African citizens in the same position as the applicants from claiming any of the childcare grants available to South African children (regardless of the citizenship-status of the children themselves). The applicants alleged that the exclusions violated the constitutional obligation to provide access to social security, infringed their constitutional rights to life and dignity, limited their right to equality and amounted to unfair discrimination; and infringed the rights of their children. The Court held that the Constitution gave 'everyone' the right to have access to social security and that this included those residing legally in the country. The exclusion of permanent residents from the legislative scheme amounted to unfair discrimination and was unreasonable. The importance of providing access to social assistance to all who live permanently in South Africa, as well as the impact upon life and dignity that a denial of such access would have, far outweighed the financial and immigration considerations on which the State relied.

It should be noted that the ICESCR, article 9 also applies to 'everyone.'

Treatment Action Campaign (TAC) case:[78] The background is HIV/AIDS in South Africa where there are some 5 million infected people. The case concerned the failure of the South African government to provide anti-retroviral drugs to HIV positive pregnant women to prevent the transmission of HIV to their babies, except in a few selected pilot areas. The TAC challenged this policy as well as the government's failure to have a reasonable policy with respect of access to the drug. The Court was asked two questions: is the policy of distributing the drug on such a restrictive basis reasonable? Does the government have a comprehensive policy for prevention of mother/child transmission? The South African Constitutional Court held that restricting access to the drug in the public health sector was unreasonable and unconstitutional. Important too was the failure to guarantee the rights of the child through providing basic health services to fulfil the child's right to health. The case thus makes clear that a comprehensive and reasonable policy is required for ensuring access to economic and social rights, in this instance, healthcare services. Distribution must not be arbitrary or discriminatory. Failure to take account of the needs of women might be directly or indirectly discriminatory.

The TAC case sits well with a case from South America. In *Mendoza & Ors v Minister of Public Health and the Director of the National AIDS-HIV-STI Program*[79] a public hospital in Ecuador where persons living with HIV/AIDS were receiving treatment stopped providing them with the required antiretroviral therapy. The applicants commenced litigation demanding the immediate restitution of the drugs and for medical tests necessary to update their medical prescriptions. Their writ alleged violations of their constitutional right to health and the guarantee that public services for medical attention shall be free of charge for those persons that need it. The Court ruled that the State is required to take precautions to safeguard the right of Ecuadorians to health and that the right to health, without prejudice to its autonomy, also forms part of the right to life. The right to health grants citizens the power to demand that the State adopts policies, plans and programmes with regard to general health and obliges the State to draw up regulations, carry out research and establish relevant public policies. The Ministry had failed in its duty to provide an immediate, diligent and effective solution and this had caused serious damage to the quality of life of those suffering from HIV/AIDS. This omission violated constitutionally guaranteed rights and the international obligations contained in treaties ratified by Ecuador and incorporated into its domestic legislation. These rights include 'positive' social rights — immediately enforceable legal rights that are binding upon the authorities, which have corresponding legal obligations. The Court concluded

[78] *Minister of Health and Others v Treatment Action Campaign and Others*, 2002, 13 Butterworths Human Rights Cases 1.

[79] Tribunal Constitucional, 3ra. Sala, Ecuador, Resolucion No. 0749-2003-RA, 28 Jan. 2004; text of decision available from COHRE ESC Rights Litigation Programme (www.cohre.org).

that, here, the right to health was an economic right, directly enforceable by the plaintiffs and that the Ministry's omission violated the plaintiffs' fundamental rights to life and to health.

A case from Venezuela, *Cruz Bermudez et al v Ministerio de Sanidad y Asistencia Social*,[80] raises the same issues. The case was brought by a number of people living with HIV/AIDS, who alleged that the Ministry had failed to supply prescribed anti-retrovirals. They claimed that violated their rights to life, health, liberty and security of the person, equality and benefits of science and technology. The Supreme Court dismissed the claims based on the rights to liberty, security of the person and equality, but stated that the right to health and the right to life of the petitioners were closely linked to the right to access the benefits from science and technology. The Court made orders directing the Ministry to provide anti-retrovirals, medications necessary for treating opportunistic infections and diagnostic testing, free of charge for all Venezuelan citizens and residents. The Ministry was also ordered to develop the policies and programmes necessary for affected patients' treatment and assistance, and make the reallocation of the budget necessary to carry out the Court's decision.

7.4 Economic and Social Rights before CEDAW

Ms AT v Hungary:[81] Ms AT brought an individual communication to the CEDAW Committee that she had been for four years a victim of severe domestic violence without any appropriate shelter to which she could go nor any protection or restraining orders available under Hungarian law. Ms AT is an example of a vulnerable person – a single mother with a disabled child whom the Hungarian legal system had failed by not according her an effective remedy. The recommendations of the CEDAW Committee that the State take 'immediate and effective measures' to ensure physical and mental integrity and that she be provided with a safe home can by analogy be applied to persons experiencing other vulnerabilities.

The first inquiry undertaken by CEDAW under the Optional Protocol concerned the murders and disappearances of women in Ciudad Juarez, Mexico. The scale of the killings, the torture and rapes endured by the victims before the deaths makes an analogy to a war zone appropriate. The Committee exposed the vulnerabilities of women in the city: they were young, come from other parts of Mexico, living in poverty, working in *maquilas* where protection for their personal security was poor, subject to deception and force (para. 63-64). The Committee noted that women in Ciudad Juarez lack basic needs – work, education, health care, housing, sanitation infrastructure and lighting (para. 289) and recommended ensuring compliance with the provisions of CEDAW, including economic and social rights (para. 290). The victims are vulnerable and fragile and so too are their relatives who require 'systematic medical, psychological and economic assistance' in their pursuit of legal remedies (para. 291).

7.5 Indivisibility of Civil and Political Rights and Economic and Social Rights

The categorisation of human rights into civil and political and economic and social rights was a product of the Cold War. It was rejected in conventions relating to vulnerable groups, for example CEDAW and CRC, and was further undermined by the assertion in the Vienna Declaration and Programme of Action, I, 5, that '[A]ll human rights are universal, indivisible and interdependent and interrelated.' This approach has allowed the interpretation of civil and political rights to include economic and social rights and thereby to read economic and social rights into instruments that do not apparently include them. This technique furthers the assumption of the justiciability of economic and social rights.

[80] Supreme Court of Justice of Venezuela, Case No. 15.789, Decision No. 916, 15 July 1999.
[81] Communication No 2/2003, 26 January 2005.

For example there are many judicial statements that the right to life includes the right to livelihood, the right to healthcare, and the right to shelter. The Human Rights Committee has considered that prohibition of torture includes provision of medical care in detention.[82] The right to health builds upon and complements other rights such as the right to life, to education, to receive information, to participate in public affairs, to freedom of expression (including sexual expression), to shelter, to food, to privacy and to protest. The Human Rights Committee in its General Comment No. 28 (2000), *Equality of rights between men and women,* requires data from States on birth rates and on pregnancy and childbirth-related deaths of women, information on measures to help women prevent unwanted pregnancies, and on the impact on of poverty and deprivation on women - all under ICCPR, article 6 (right to life). The ECHR does not include economic and social rights but the European Court has held that the right to a fair hearing (ECHR, article 6) was violated by proceedings that barred the applicant from continuing to receive a health insurance allowance *(Feldbrugge v The Netherlands)*; that the right to impart and receive information (ECHR, article 10) was violated by a governmental ban in Ireland on counselling and circulation of information regarding legal abortions in Britain *(Open Door Counselling and Dublin Well Women v Ireland)*; that the right to respect for private and family life (ECHR, article 8) was violated by the government's failure to warn the local population of the dangers associated with a chemical factory in the neighbourhood *(Guerra v Italy; Lopez Ostra v. Spain; Fadeyeva v. Russia)*.

[82] *Lantsova v The Russian Federation,* communication no 763, CCPR/C/74/D/763/1997, 2002.

8. Application of Specific Rights

This section sets out the international obligations with respect to specific economic and social rights.

8.1 Right to Highest Attainable Standard of Physical and Mental Health:

- UDHR, article 25;
- ICESCR, article 12;
- CESCR, General Comment No. 14;
- CERD, article 5;
- CEDAW, article 12, 14 (2) (b) (rural women);
- CEDAW, General Recommendation No. 24;
- CRC, article 24;
- CRC, General Comment No. 3 (HIV/AIDS and the rights of the child);
- Declaration, Victims of Crime, para. 14-15;
- AfCHR, article 16;
- GC IV, article 55 (occupying power duty to ensure medical supplies for the population) and article 56;
- GC P1, article 10;
- GC PII, article 7(2), 8;
- IDP, Principle 18 (2) (d);
- Beijing PFA, article 147 (f);
- ESC, principle 11, 13;
- ESC, Part II, article 11, 13;
- PRWA, article 14;
- ICRMW, article 28 (all MWs), 43 (documented);
- IDP, Principle 19, 19 (2) requires special attention to the health needs of women;
- Palermo Protocol, article 6 (3) (c);
- CE, Trafficking Convention, article 12 (1) (b), 12 (3);
- Great Lakes Agreement, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, article 6 (7) (8) (Member States to establish legal and medical procedures for assisting the victims and survivors of sexual violence);
- Indigenous and Tribal Peoples Convention, ILO, 1989, article 25, 30.

8.2 Food and water:

- UDHR, article 25;
- ICESCR, article 11;
- CESCR, General Comment No. 12, *The right to adequate food*, para. 15: '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';
- CRC, articles 24, 27;
- PRWA, article 15 (food security);
- GC IV, article 55 (occupying power duty to ensure food for the population), article 59 (occupying power to agree to relief schemes if necessary);
- GC P1, article 70;
- IDP, Principle 18 (2) (a);
- Beijing PFA, article 147 (f).

8.3 Shelter:

- UDHR, article 25;
- ICESCR, article 11 (included within 'an adequate standard of living');
- CESCR, General Comment No. 4 and 7; General Comment No. 4 clarified that the reference to 'himself and his family' in ICESCR, article 11 'cannot be read today as implying limitations upon the applicability of the right to individuals or to female headed households';
- CERD, article 5;
- CEDAW, article 14 (2) (h) (rural women);
- CRC, article 27;
- PRWA, article 16;
- ICRMW, article 43 (documented);
- ESC, Part II, articles 16 and 31;
- GC P1, article 69;
- IDP, Principle 18 (2) (b);
- Beijing PFA, article 147 (f);
- Palermo Protocol, article 6 (3) (a);
- CE, Trafficking Convention, article 12 (1) (a).

8.4 Social/Financial Security:

- UDHR, article 22, 25;
- ICESCR, article 9;
- CESCR, General Comment No. 5, para. 28 (social security for persons with disabilities);
- CESCR, General Comment No. 6, para. 26-30 (social security for older persons);
- CEDAW, article 13, 14 (2) (c) (rural women);
- CRC, article 26;
- ICRMW, article 27 (all MWs), 43 (documented);
- Beijing PFA, article 147 (f);
- Beijing PFA, article 147 (n) (provision of basic and support services to women who have been displaced for reasons linked to violence);
- ESC, principles 12-14;
- ESC, Part II, articles 12-14;
- RC, article 23 (public relief), article 24 (social security);
- Indigenous and Tribal Peoples Convention, ILO, 1989, article 24, 30;
- CE, Trafficking Convention, article 12 (1) (a);
- Great Lakes Agreement, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, article 6 (8) (facility for social and legal assistance to victims and survivors of sexual violence).

The ECtHR has affirmed the need for particular diligence in due process in social security cases.[83]

8.5 Education:

- UDHR, article 26;
- ICESCR, article 13;
- CESCR, General Comment No. 13;
- CERD, article 5;

[83] *Deumeland v. Germany* (Appl no 9384/81), para. 90.

- CEDAW, article 13;
- CEDAW, article 12, 14 (2) (d) (rural women);
- CRC, article 28, 29, 40;
- CRC, General Comment No. 1;
- AfCHR, article 17;
- ECHR, P1, article 2;
- ESC, principles 9-10 (vocational training);
- ESC, Part II, articles 9-10;
- RC, article 22;
- PRWA, article 12;
- Indigenous and Tribal Peoples Convention, ILO, 1989, articles 26-7, 30;
- ICRMW, article 30 (all MWs), 43 (documented);
- Beijing PFA, article 147 (f);
- Beijing PFA, article 147 (g);
- Palermo Protocol, article 6 (3) (d);
- CE, Trafficking Convention, article 12 (1) (f) (children);
- IDP, Principle 23.

8.6 Employment:

There are many aspects of the right to work/employment developed in particular through the ILO Conventions. The essence however is non-discrimination in the guarantee of opportunity to have fulfilling and dignified work under safe and healthy conditions and with fair wages ('equal pay for equal work') affording a decent living for oneself and one's family.

- UDHR, article 23;
- ICESCR, articles 6, 7, 8, 10;
- ICCPR, articles 8, 22;
- CERD, article 5;
- CEDAW, article 11, 14 (2) (e) (rural women);
- AfCHR, article 15;
- PRWA, article 13 (Economic and Social Welfare Rights);
- RC, article 17;
- ICRMW, article 25 (all MWs), 43 (documented);
- ESC, principles 1-8;
- ESC, Part II, articles 1-8, 24-9;
- IDP, Principle 22 (1) (b);
- Indigenous and Tribal Peoples Convention, ILO, 1989, article 20, 30;
- Palermo Protocol, article 6 (3) (d);
- CE, Trafficking Convention, article 12 (4).

8.7 Property Rights:

- UDHR, article 17;
- ECHR, P 1, article 1;
- AfCHR, article 14;
- PRWA, article 21 (women's right to inheritance);
- IDP, Principle 21, 21 (3) requires that property and possessions left behind by IDPs should be protected against destruction, arbitrary and illegal appropriation, occupation or use;
- Great Lakes Agreement, Protocol on the Property Rights of Returning Persons.

The Great Lakes Protocol is a good model in that it spells out some important principles: putting in place legal principles to ensure that returning refugees and IDPs, recover their property with the assistance of the local traditional and administrative authorities; special protection for returning women, children, and communities with special attachment to land; legal remedies for the loss or destruction of the property of IDPs and refugees, and persons resettled or relocated elsewhere (article 2).

The legal bases for protection spelled out under the Protocol are the existing obligations on property rights and non-discrimination guaranteed in the human rights instruments listed above.

Member States are required to provide legal mechanisms for the implementation of the property rights of IDPs, refugees and resettled persons, including simplified judicial processes, alternative and informal community processes with simple requirements for proof of ownership based upon reliable and verifiable testimony (article 4).

Article 5 requires States to deal with special claims of protection made by returning spouses, single parents, and single women with respect to the ownership of family or other property when a displaced spouse is deceased; to give effect to the legal capacity of returning women and all women, including single women, to own land and other property in their own right; to establish legislative, administrative, legal and other mechanisms to guarantee that returning spouses succeed to the property of their deceased spouses.

Article 6 protects the property rights of children and orphans and article 7 those of returning communities.

Article 8 provides for compensation.

9. Upon whom is the Obligation?

The primary duty-holder for securing economic and social rights is the State, which remains responsible for performance of its international obligations when acting with or as a member of an international institution.[84] For example when dealing with the World Bank the State cannot undertake to carry out reforms that will undermine its compliance with its obligations under the ICESCR.

The UDHR extended the range of potential duty holders beyond the State in article 29 which states:

> The General Assembly proclaims this UDHR as a common standard of achievement for all peoples of all nations, to the end that every individual and every organ of society, keeping this Declaration in mind shall strive by teaching and education to promote respect for these rights and by progressive measures, national and international to secure their universal recognition and observance.

The UDHR included both civil and political and economic and social rights.

Unlike the ICCPR the ICESCR explicitly refers to the possibility of international assistance and cooperation (articles 2(1); 11(1); 15(4); 23). This raises two questions: must a State accept international assistance in securing economic and social rights and must such international assistance be offered by other States? ICESCR, article 11(1) recognises 'the essential importance of international co-operation based on free consent.' In its General Comment No. 12 the CESCR develops this obligation by asserting that 'states 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' (para. 36). Other instruments also recognise the role of the international community, for example Beijing PFA, article 147(f) includes among actions to be taken that the international community and its international organisations provide financial and other resources for emergency relief and longer term needs, especially for refugee women and IDP women.

The international community plays a significant role in the negotiation and mediation of peace agreements. Many are endorsed by the Security Council. The CESCR's instruction that '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' is pertinent to the content of peace agreements and setting post-conflict priorities. '[T]he joint and individual responsibility … to cooperate in providing disaster relief and humanitarian assistance in times of emergency' would seem applicable to conflict and its aftermath if national social institutions remain inadequate, as well as to other forms of emergency such as natural disaster. There also seems no reason why such provisions should be restricted to the right to food but could apply to other economic and social rights. However the suggestion that there is a duty upon States under international law either to assist in delivery of economic and social rights to other States, or to receive it, remains controversial.[85]

The International Financial Institutions also have a crucial role to play post-conflict. It used to be widely accepted that human rights considerations were irrelevant and even antithetical to the

[84] The CESCR has spelled out that economic and social rights must be taken into account in the design of a sanctions regime by the UN Security Council; CESCR, General Comment No. 8 (1997), *The relationship between economic sanctions and respect for economic, social and cultural rights,* para. 12. This same principle must apply to the design of economic regimes by other institutions.

[85] M. Craven, 'The Violence of Dispossession: Extra-territoriality and Economic, Social and Cultural Rights', in M. Baderin and R. McCorquodale, *Economic, Social and Cultural Rights in Action*, p. 77.

international financial institutions such as the World Bank and the regional Development Banks whose mandates for economic development require non intervention on political issues.[86] This understanding now has much less force, not least because of these institutions' own commitments to good governance, sustainable development and poverty reduction. Good governance encompasses democratisation, rule of law, participation and transparency while a country's human rights record, which reflects the presence or absence of socio-political conditions for the successful pursuit of sustainable development objectives, is also pertinent to the wider 'economic' conditions for lending activities.[87] Further economic programmes requiring structural adjustment and privatisation 'have led to increased impoverishment, particularly amongst women, displacement and internal strife resulting from the political instabilities caused by devaluing national currencies, increasing debt and dependence on foreign direct investment.'[88]

States retain their own treaty obligations. The Maastricht Principles state that States should 'ensure that their own national obligations on economic, social and cultural rights ... are not ignored when the very same state, headed by the very same government, is representing a multilateral organization' and that IFIs should 'correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights.'[89] The obligation to 'protect' requires States to ensure that vulnerable persons are not deprived of their economic and social rights through policies adopted in multilateral institutions.[90] Ssenyonjo argues that there should be a clear and consistent human rights impact assessment carried out at all stages of World Bank (and presumably regional Development Banks) and International Monetary Fund's processes to ensure at the very minimum that they 'do no harm.'[91] Such a proposal has great impact at the time of post-conflict reconstruction and should act as a constraint on rapid economic reform.

[86] D. Bradlow and C. Grossman, 'Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF', 1995, 17 *Human Rights Quarterly* 411.
[87] G. Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change toward Sustainable Development', 1998, 92 *American Journal of International Law* 642.
[88] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, *On trafficking in women, migration and violence against women*, submitted in accordance with Commission on Human Rights Resolution 1997/44, UN Doc. E/CN.4/2000/68, 29 February 2000, para. 59.
[89] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, para. 19, available at http://heiwww.unige.ch/humanrts/instree/Maastrichtguidelines_.html.
[90] M. Ssenyonjo, 'Non-State Actors and Economic, Social and Cultural Rights', in M. Baderin and R. McCorquodale, *Economic, Social and Cultural Rights in Action,* p. 109 and p. 120 and references to the CESCR Concluding Comments there cited.
[91] Ibid, p. 133.

10. Conclusions

Where one of the patterns of conflict has been discrimination against women (for example through the commission of gender-based crimes against women) it is imperative that discrimination is not continued post-conflict. However the reality is that it is likely to do so unless there is deliberate intervention to prevent it. This is also applicable to discrimination against other groups and persons, especially those made vulnerable through conflict. Such intervention should be provided for within any peace agreement or settlement and targeted steps taken to ensure its implementation post-conflict and budgets allocated. In the context of women this is part of the rationale for SC Resolution 1325 on *Women, peace and security* which requires two separate policies: 'gender balance' in participation throughout all processes for decision-making, policy-making and operationalising measures for post-conflict peace-building; and 'gender mainstreaming' in the formulation of all peace-building policies, practices and law and in their implementation. Failure to do so risks excluding women (and other vulnerable peoples) from the terms of the post-conflict settlement and thereby their participation in governmental or other political bodies responsible for planning and putting into effect the post-conflict arrangements. Such marginalisation undermines post-conflict sustainable development and transitional justice. It also distorts the democratic models of full participation in public decision-making as required *inter alia* by ICCPR, article 25 and CEDAW, article 7.

All those involved at all stages of negotiation and implementation of post-conflict arrangements[92] should be aware of their obligations with respect to the international legal prohibition of direct or indirect discrimination (deemed by the Inter-American Court of Human Rights to be a *jus cogens* norm) on the grounds stipulated in the UDHR, ICCPR and ICESCR (and additional grounds set out in the other international instruments discussed above) and ensure compliance with it. This requires identification of vulnerable people, ensuring special attention to the intersectionality of disadvantage to women within other groups such as ethnic or religious minorities, IDPs or refugees, and providing the appropriate national legal and policy framework.

The paper has focused on the guarantee of economic and social rights because sustainable development requires their progressive realisation. International standards whether of procedure or substance must be operationalised at the national level. States and other international actors have positive obligations of conduct with respect to their delivery. All relevant bodies – the UN Human Rights Council through the universal periodic review process, human rights treaty bodies through the reporting system, and national human rights institutions – should interrogate States as to the steps they have taken in this regard, the obstacles they have encountered, the benchmarks they are applying and their indicators for ensuring progress.

Recommendations:

- Peace agreements, and settlements in other forms (for example SC resolutions), to include provision for non-discrimination against all identified vulnerable groups.

- Peace agreements, and settlements in other forms (for example SC resolutions), to include provision for economic and social rights in post-conflict reconstruction, with the facility for the introduction of temporary special measures for their delivery.

[92] Security Council Resolution 1325 is addressed to 'all actors involved, when negotiating and implementing peace agreements.'

- Peace agreements and settlements to specify that such obligations rest upon the State target of such agreement, any occupying power, any international administration or multinational force, international and regional institutions.

- Donor's conferences to include agenda items on these obligations.

- Peace agreements and settlements to provide that States implement national legislative programmes as soon as possible and that these include the requisite framework for economic and social rights.

- Post-conflict capacity building to include agencies for the delivery of economic and social rights.

- Training of national security forces (including police) to include economic and social rights.

- Judicial training to include justiciability of economic and social rights.

- Human rights institutions that are specified within post-conflict arrangements, such as national human rights commissions, human rights ombudsperson, human rights chambers to have economic and social rights explicitly included within their mandates.

- Relevant UN and regional human rights bodies to include delivery of economic and social rights within their monitoring mechanisms.

Annexes

Reservations and Declarations to ICESCR

Bangladesh Declaration
Articles 2 and 3:
'The Government of the People's Republic of Bangladesh will implement articles 2 and 3 in so far as they relate to equality between man and woman, in accordance with the relevant provisions of its Constitution and in particular, in respect to certain aspects of economic rights viz. law of inheritance.'

Egypt Declaration
'... Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it...'

Kuwait
Interpretative declaration regarding article 2, paragraph 2, and article 3:
'Although the Government of Kuwait endorses the worthy principles embodied in article 2, paragraph 2, and article 3 as consistent with the provisions of the Kuwait Constitution in general and of its article 29 in particular, it declares that the rights to which the articles refer must be exercised within the limits set by Kuwaiti law.'

Interpretative declaration regarding article 9:
'The Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis.'

Reservation concerning article 8, paragraph 1 (d):
'The Government of Kuwait reserves the right not to apply the provisions of article 8, paragraph 1 (d).'

Pakistan (Declaration)
'While the Government of Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan.'

Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Kenya, U.N. Doc. E/C.12/1993/6 (1993)

…

18. Regarding the right to education, the Committee expresses its concern about the low school attendance of children in the poorest areas of the country and in nomadic communities. The Committee observes that the obligation of States parties to the Covenant to ensure that "primary education shall be compulsory and available free to all" applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school. The Committee also draws the attention of the Government of Kenya to the obligation, contained in article 14 of the Covenant, and applying in cases where free compulsory education has not assured, to "work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years" of the relevant right. The Committee also regrets the significant gender disparities and regional differences with regard to access to education, the significant difference in quality between the government secondary schools and the Harambee or community schools, as well as the difficulties encountered through the introduction of the new 8-4-4 system of education.

…

ICESCR – Core Obligations

General Comment No. 3 – The Nature of State parties' obligations

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 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, the analysis by UNDP in its Human Development Report 1990 and the analysis by the World Bank in the World Development Report 1990.

General Comment No. 12 – The Right to Food

6. […] 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.

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 breast-feeding, 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.

General Comment No. 13 – The Right to Education

57. In its General Comment 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)).

General Comment No. 14 – The Right to Health

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, 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 (pre-natal 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" which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

General Comment No. 15 – The Right to Water

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 programs 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.

General Comment No. 18 – The Right to Work

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.

General Comment No. 19 – The Right to Social Security

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. 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, 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;

(c) To respect existing social security schemes and protect them from unreasonable interference;

(d) To adopt and implement a national social security strategy and plan of action;

(e) To take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalized individuals and groups;

(f) To monitor the extent of the realization of the right to social security.

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.

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.