



Part Two: An Overview of Women's ESC Rights Under ICESCR and CEDAW

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2. An Overview of Women's ESC Rights Under ICESCR and CEDAW

2.1 Women's Economic, Social and Cultural Rights

Human rights are inherent and inalienable rights all people have because they are human and they are therefore universal.¹ These basic principles were first established in the UDHR² and later by the ICESCR³ and the ICCPR.⁴

States have obligations arising from the fundamental and inherent nature of human rights as well as under international human rights law and are legally accountable for violations of these duties.⁵ All human rights are “indivisible, interdependent, inter-related, and of equal importance for human dignity.”⁶ This principle recognizes that all human rights—economic, social, civil, political and cultural—are equally necessary to human dignity and equality. These categories fail to capture the inherent connectedness of all human rights and the necessity of their realization in ensuring women's equality.

The position that economic, social and cultural rights are not in fact rights, or cannot be adjudicated, is outdated and has been proven incorrect by domestic, regional and international courts around the world.⁷ The adoption of the OP-ICESCR itself signals an important shift in the international recognition of justiciability of ESC rights. Furthermore, the traditional dichotomy between so-called “positive” and “negative” rights is also being scrutinized, given clear evidence that all human rights include both negative and positive obligations on States. That is, for most rights, States will be required to refrain from action and to take positive steps and invest resources to realize human rights.⁸

The full spectrum of obligations related to women's economic, social and cultural rights are drawn from many sources. At the international level the two most relevant are the ICESCR and CEDAW. However, due to the interdependent and indivisible nature of human rights, as well as the need to address rights-violations in an intersectional way

based on the affected women or group of women (or girls) in a particular case; it will also be important to be familiar with the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities, among others.⁹

In addition to international agreements and mechanisms, there are several important regional human rights agreements and mechanisms which are directly relevant to women's economic, social and cultural rights, including:

- **African System**—Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol);
- **Inter-American System**—Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador);
- **European System**—European Social Charter and Council of Europe Convention on preventing and combating violence against women and domestic violence.¹⁰

The treaties listed above all provide relevant interpretative scope for each of the rights below. Depending on the region in which you are working in, or the affected group of women with whom you are advocating, your communication, shadow report or other advocacy should also reference the relevant understanding of women's human rights as set out in those documents.¹¹ The list below is not exhaustive and how the issue is ultimately defined in the communication or inquiry should be context specific to the case you are highlighting.

2.2 Overview of Substantive Rights

Below are eight commonly recognized economic, social

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and cultural rights, which draw primarily on the ICESCR and CEDAW in their description. In the section below, women's ESC rights are discussed in a way which highlights the links between CEDAW and ICESCR's elaboration of these rights and obligations. It is important to note that both CEDAW and ICESCR highlight critical but different aspects of each right and obligation. CEDAW is central to arguing the discriminatory effect of ESC rights violations on women and ICESCR will be critical to elaborating the substantive scope of the rights at issue in the communication or inquiry.

➤ Non-Discrimination and Equality

(ICESCR, art 2(2), 3; CEDAW art 2, 3, 4, 5)

States may not discriminate against women, or groups of women, in law or in practice. Moreover, States have the obligation to ensure women and men the equal right to enjoy economic, social and cultural rights. Non-discrimination in law alone will not be enough for the State to satisfy

this obligation. States are required to **adopt appropriate legislative measures**, and modify or **abolish existing laws, customs and practices** to prohibit discrimination against women, in both the public and private spheres. States should also adopt **special measures** designed at accelerating de facto equality between men and women, including steps to modify social, cultural and familial patterns of conduct.

➤ Right to work

(ICESCR Article 6, 7, 8, 10(3); CEDAW Articles 5(a), 6, 11, 14(1))

The right to work entitles women workers to have the possibility to **earn their living through freely chosen work** and to **working conditions** that are safe and healthy and are not demeaning to human dignity. Workers must be guaranteed a **fair wage** that allows for a decent life for them and their families. There should be **no**

discrimination of any kind in employment or promotion, including those based on gender stereotypes. Equal work should be compensated with **equal pay**, and employers should provide their workers with periodic and paid **holidays**. The right to work also includes the **right to associate** with one another and bargain for better working conditions, the right to join the trade union of their choice and the right to strike as long as it is in conformity with the laws of the country. **Forced labour and trafficking are illegal** under international law and are grave violations of human rights. States must ensure child labour is prohibited under a certain age and when girls do work they must be provided additional protections.

➤ Right to social security including social insurance

(ICESCR Article 9, 10(2), 11(1); CEDAW Article 11(1)e, 11(2), 14(2)c).

States must recognize the right of everyone to **social security**, including **social insurance**, which guarantees that everyone will be provided with the **minimum goods and services** required for a dignified life. It is the duty of the State to make sure that everyone in its territory is afforded **protection without discrimination** from “(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.” Special attention should be given to increasing access to social security benefits for disadvantaged and marginalized groups, such as **older women and women who work in the informal sector**. States must also ensure equalization of the compulsory retirement age for both men and women; ensure that women receive **equal benefits** in both public and private pension schemes; and guarantee adequate maternity leave for women, paternity leave for men, and parental leave for both men and women. Maternity leave, social security and childcare should be available to both formal and informal workers.

➤ Right to food

(ICESCR Article 11; CEDAW Article 14(g)(h), 16(h))

The right to food is essential for a dignified life and is

vital for the realisation of many other rights, such as the rights to life, health and education. The right to food is **not limited to just having a certain amount of calories** and necessary nutrients in one’s diet; it means that everyone should have **physical and economic access** to food or the means of producing it at all times. States must also **prevent discrimination in access to food or resources for the procurement of food**. The State must ensure that “women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so, and ensure that **women have access to or control over means of food production**, and actively to address customary practices under which women are not allowed to eat until the men are fully fed, or are only allowed less nutritious food.”

➤ Right to housing

(ICESCR Article 11(1); CEDAW 14(h), 16(h))

The right to housing should be understood as encompassing all those elements in a residence that are essential to a life with dignity: security from outside or domestic threats, a healthy living environment, **security of tenure, affordability, habitability, accessibility, culturally adequate, proximity to necessary services, and freedom to choose one’s place of settlement**. Government must **develop national policies** that will guarantee this right to all its citizens. Forced evictions are understood as a prima facie violation of the right to adequate housing. “The State itself must **refrain from forced evictions** and ensure that the law is enforced against its agents or third parties who carry out forced evictions.” If an eviction is absolutely necessary, it must be carried out in conformity with international human rights law and must not result in homelessness. No one should be deprived of some form of housing even in times of economic downturn.

➤ Rights to water and sanitation

(ICESCR Articles 11 and 12; CEDAW Article 14(h))

The CESCR has stated that the right to water is indispensable for leading a life in human dignity and is a **pre-requisite for the realization of other human rights**. Among other requirements, States must ensure the right of access to water and water facilities and services on

a **non-discriminatory basis**, especially for disadvantaged or marginalized groups and must ensure women's security is not threatened when physically accessing water. The right to water requires that everyone has access to an adequate amount of drinking water for **personal and domestic uses**. The full enjoyment of this right means access to water that is **affordable, clean and physically accessible**. Because **women have been traditionally excluded** in policy-making and decision-making on water, State Parties should ensure they participate. States should ensure that the allocation of water resources, and investments in water, **facilitate access to water for all members of society**. States should ensure that policies and entitlements related to access to water should account for the **disproportionate burden women bear in the collection of water** and its use within the household. States must ensure that women and girls have adequate access to **safe and clean sanitation facilities** at school, and in public buildings for those under state supervision.

➤ Right to education

(ICESCR Articles 13 and 14;
CEDAW Articles 5, 10, 11(c), 14(2)d)

Education has been regarded both as an end in itself and as a means for the individual and society to grow. It is the key to full economic, social, cultural, civil and political participation in society. It encompasses two broad components: enhancement of **access for all to education** on the basis of **equality and non-discrimination** and **freedom to choose** the kind and content of education, which is **available, accessible, acceptable and adaptable**. Access to primary education is a minimum core obligation; **universal primary education** must be compulsory and free of charge for girls and boys. States should implement **temporary special measures** to ensure **de facto equality** for girls and in all educational settings, including higher education. The State should adopt legislation and policies to ensure the **same admission criteria for boys and girls** at all levels of education. State Parties should ensure, in particular through information and **awareness-raising campaigns**, that families desist from giving preferential treatment to boys when sending their children to school, and that **curricula promote equality and non-discrimination**. State Parties must create

favourable conditions to ensure the **safety of children**, in particular girls, on their way to and from school as well as while there. Educational systems and policies must also account for **intersectional discrimination** which affects girl children, such as disability and migratory or citizenship status. States also must provide **vocational and adult education** and lifelong learning which are crucial for women's enjoyment of human rights, as well as to ensure de facto equality.

➤ Right to the highest attainable standard of physical and mental health

(ICESCR Article 11, 12; CEDAW Article 12, 14(b))

The right to health is related to the fundamental right of each person to **live in dignity**. It entitles people to enjoy the **best available health care**, but it is not limited to this. "The right to health is closely related to and **dependent upon the realization of other human rights**, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement." Safe and secure housing, a clean environment, freedom from harmful traditional practices, proper nutrition and accurate and accessible information on sexual and reproductive health, are also the bases for a healthy life. The right to health also entitles women to have **control over their bodies** and their health. States must **"eliminate discrimination** against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period." **"Societal factors are largely determinative of the health status of women, ...and for that reason, 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." States must ensure the greatest possible **availability, accessibility, acceptability and highest quality healthcare** for all on the basis of non-discrimination.

► Cultural rights

(ICESCR Article 15; CEDAW Articles 10(g), 13(c), 14(2)f)

Women have the right to **freely determine their identity, chose their religion and decide their own political beliefs**. Education plays an important role in promoting cultural diversity and forging tolerance among different groups. Governments should recognise and protect the **cultural diversity** of their citizens. Cultural rights cannot be used, however, as a justification for practices that **discriminate against women** or violate human rights. Institutional barriers and other obstacles must be overcome, such as those based on cultural and religious traditions, which prevent women from **fully participating in cultural life**, science education and scientific research, and directing resources to scientific research relating to the **health and economic needs of women** on an equal basis with those of men. Women must have the same opportunities to **participate in sports and other recreational activities** and reasonable accommodation should be made for women with disabilities. Women also have the right to **benefit equally from scientific progress**, and States should provide funding for research which directly targets diseases and conditions disproportionately affecting women.

► Marriage and Family

(ICESCR Article 10; CEDAW Articles 13(a), 14(1), 16)

Women have the right to **chose their marriage freely** and be equally represented, including in passing their nationality onto their children, dissolution of the marriage, family benefits, court and administrative proceedings, contracts and loans, guardianship of the children, choosing a profession and **ownership and inheritance of property**. States must also ensure that women have the ability to decide on the number and spacing of their children, have the same personal rights as to family name, ability to choose a profession and same rights and obligations within the family. **Special protections** should be afforded to mothers before and after childbirth, including paid leave and social security benefits. States should also account for the particular roles rural women have in ensuring the economic survival of their families. Family laws including child maintenance, child custody, marital powers and property should not reinforce **gender stereotypes**.

2.3 Principles and Obligations

There are also several key principles arising under both CEDAW and ICESCR that are necessary to refer to when making claims under either Optional Protocol and in general advocacy on women's ESC rights.

✓ Substantive Equality

The State obligation to ensure women's substantive equality in the enjoyment of economic, social and cultural rights under the ICESCR is captured in Articles 2(2) and 3 and Articles 1 and 2 of CEDAW. Ensuring a comprehensive application of the obligations in these Articles "requires an understanding that focuses upon the subordination, stereotyping, and structural disadvantage that women experience."¹² Utilizing the substantive equality framework to outline a communication allows a complainant to highlight the full spectrum of rights at issue in the case, both within the specific context of the violation while also accounting for the broader structural, cultural and social factors to be included.

States have the immediate duty to ensure that women are not being directly or indirectly discriminated against in access to, or fulfillment of, a substantive right.¹³ Both CEDAW and the CESCRC have interpreted this obligation as not only requiring the State to prevent discrimination but to take positive steps to remedy past and structural discrimination that goes beyond enactment of laws—beyond legal or formal equality to substantive or de facto equality.¹⁴ Specifically, General Recommendations 28 of CEDAW and General Comment 16 and 20 from CESCRC detail this obligation. States can violate principles of equality with policies and practices that on their face value are neutral, but that have a discriminatory impact or effect on certain disadvantaged groups.¹⁵

A great many of the claims which will emerge under the OP-CEDAW and OP-ICESCR in relation to women's ESC rights will require a more robust approach to analyzing these issues and in promoting the broader social, economic, political policies needed to realize women's ESC rights. Claimants will need to ensure the substantive equality framework is integrated and utilized as the primary lens for analyzing women's ESC rights violations and in framing the request for a remedy.

For instance, when States develop social security and

assistance programs that deny women access to an income reasonably calculated to ensure an adequate standard of living they not only exacerbate the preexisting vulnerable situation of poor women, they also expose women to particular harms that reinforce their subordination and vulnerable status.¹⁶

A substantive equality analysis of the impact of social assistance on women in this example would show that due to the historic and socialized role of women in most societies, her ability to work throughout her lifecycle has been limited due to less access to quality education, childbirth, traditional family care-giving roles, and concentrations in part-time or informal work. This impacts women's ability to build a work and salary history which is often a key component in calculating social security. In addition, when social assistance funds do not accurately account for real costs, women disproportionately suffer as this may increase their exposure to domestic violence and sexual exploitation.

Therefore, the substantive equality approach requires States to acknowledge the actual impact policies and practices have on women, looking at the particular context and take positive measures to ensure equal access and equal benefits for women.

The substantive equality approach highlights that State must have an active role in providing and facilitating the development of comprehensive economic and social policies and programs which account for the differing needs and circumstances of women.¹⁷ "The fact that, for women, poverty enlarges every dimension of women's inequality, not just the economic dimension.(...) without access to adequate social assistance and social services, including transitional housing, access to training and education, and effective legal rights...women are much less able to resist or escape their subordination."¹⁸

The requirement of **temporary special measures** is another example of positive measures required to combat discrimination and is a State obligation arising out of Article 4 of CEDAW and Article 2(2) of ICESCR (as interpreted in General Comment 20). It is a method that CEDAW developed to accelerate women's substantive equality, even if formal equality already exists.¹⁹ Temporary special measures require governments to evaluate discrimination against women "in a contextual way" and take affirmative steps to transform the current structures which perpetuate women's

Substantive equality in the Inter-American Human Rights System

The Inter-American System has been increasingly integrating the notion of structural discrimination and inequality in the analysis of its recommendations. The Inter-American Commission and Court have moved towards a concept of material or structural inequality that recognizes that certain sectors of the population are disadvantaged in exercising their rights, due to legal and factual obstacles and consequently require the adoption of special measures to guarantee equality. This implies the necessity of differential treatment when, due to circumstances affecting a disadvantaged group, identical treatment will in actual effect result in discrimination or fail to address the discrimination as experienced by that particular group. It also requires an examination of the social trajectory of the alleged victim, the social context in which the norms and policies are considered, and the vulnerability of the social group in question.

In *Niñas Yean y Bosico vs. República Dominicana*, the Inter-American Court held "that the binding legal principle of equal and effective protection of the law and non-discrimination mandates that the States, in regulating the granting of citizenship, should refrain from creating regulations that discriminate on their face or in effect against certain sectors of the population. Moreover, States must combat discriminatory practices at all levels, especially in government, and ultimately must adopt the necessary affirmative measures to ensure actual equality under the law for all persons. (Inter-American Court on Human Rights, *Niñas Yean y Bosico vs. República Dominicana*, September 8, 2005.)

inequality.²⁰ Temporary special measures should be distinguished from more general positive measures or longer term policy changes required to realize equality for women and girls. Rather than permanent changes in social policy, temporary special measures can be invoked to deal with particular issues adversely affecting women's human rights. The duration of the measure is not fixed, and may be necessary for a long period of time, but the concept is that the

Substantive Equality and Disability

For example, women with disabilities encounter a particular historic and systemic situation of discrimination based not only to social constructions of gender but also due to the long-accepted medical model of disability. The medical model posits that women with disabilities are naturally excluded from social functions because medical conditions that impede participation. This has meant that women with disabilities face two deep layers of social and economic exclusion related to gender and disability. Disability advocates have long argued that social conditions of exclusion, rather than inherent biological or medical differences, form the main barrier to active participation of women with disabilities in society.²⁸

measure will be discontinued once equality is reached.²¹

The obligation of non-discrimination and therefore the obligation to ensure both women and men have equal right to the enjoyment of ESC rights is **non-derogable** (the State is not allowed to place limitations on the right).²² In addition, the CESCR has drafted General Comment 16 to Article 3 on the equal right of men and women to the enjoyment of all economic, social and cultural rights. General Comment 16 integrates the framework of substantive equality and temporary special measures into the ICESCR²³ and this has been reflected in some of the subsequent General Comments adopted by the CESCR.²⁴ The Committee affirmed that in some cases this may mean the State will need to take measures specifically favorable to women, which “suppress conditions that perpetuate discrimination” in order to achieve substantive equality.²⁵ Further, General Comment 20 notes that States must “immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination.”²⁶

Intersectionality

Within this framework it is critical to also integrate the intersectionality dimension of the principle of non-discrimination. For example, General Comment 6 of the CESCR on older persons extrapolates the multiple forms and intersectionality of discrimination experienced by older women and

provides a comprehensive interpretation of State obligations in this context. In particular it highlights the fact that the “discrimination older women experience is often multidimensional, with age discrimination, compounding other forms of discrimination based on sex, gender, ethnic origin, disability, poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds. Older women who are members of minority, ethnic or indigenous groups, or who are internally displaced or stateless often experience a disproportionate degree of discrimination. This is equally true for indigenous women, women with disabilities, lesbians, minority women, migrant women, girls, etc.”²⁷

If you are submitting a communication under the OP-CEDAW or OP-ICESCR on behalf of a women experiencing multiple forms of discrimination, it is critical that you detail the ways in which the denial of the ESC rights is particularly experienced by the woman or group of women represented in your complaint, highlighting how this denial of access to a substantive right has been exacerbated or experienced differently due to intersectional discrimination.

We can see examples of the medical model play out in the case of *Gauer and Others v. France*, where five women with intellectual disabilities, each under guardianship, were sterilized without their informed consent and against their wishes.²⁹ The doctors claimed the sterilizations were medically necessary and in the best interests of these women. No due process procedures were conducted to actually examine whether these decisions were correct. In order to effectively redress this violation which resulted from discrimination both because they are women, but also because they have intellectual disabilities, understanding the multiple layers of social and cultural discrimination surrounding gender and disability at play in this case are key.

✓ Respect, Protect and Fulfill

All human rights require States to meet the immediate obligations to respect and protect. The obligation to respect requires States to refrain from actions that directly or indirectly discriminate against women and infringe on their enjoyment of ESC rights. States Parties must not adopt or repeal laws, policies, or programs (including those which appear neutral on their face) which adversely impact women’s equal enjoyment of ESC rights.³⁰

The obligation to protect requires States to take steps directed at eliminating of prejudices and gender-based stereotypes; to adopt constitutional and legislative provisions on equality and non-discrimination between men and women; to ensure administrative programs and institutions to protect against discrimination against women; and ensure effective remedies and redress.³¹ Importantly, States must monitor and regulate the conduct of non-State actors, including corporate actors, to ensure equal rights of women to ESC rights, including where public services have been partially or fully privatized.³²

The third obligation on all States with regard to human rights is the obligation to fulfill. Despite the generally progressive nature of obligations to fulfill ESC rights, the Covenant defines at least two obligations of immediate character under the ICESCR: (1) “to take steps” to allow for continuous progress in the realization of ESC rights, (2) on a basis of non-discrimination.³³ Further in General Comment 16, CESCR notes its “[t]he equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States Parties.”³⁴

Under the immediate obligation to “take steps,” these steps must be deliberate, concrete and targeted and States must detail the steps taken including developing a plan of action for implementation.³⁵ In particular, the CESCR has noted that access to effective remedies for violations of rights; implementation of laws and policies targeted at realizing women’s ESC rights; monitoring mechanisms to ensure implementation; implementation of human rights education and awareness-raising programs; and participation of women in all spheres of policy-making, are all particular obligations of States to fulfill women’s ESC rights.³⁶

Progressive Realization

The obligation to achieve progressively the full realization of the rights requires States Parties to exert its best efforts to implement ESC rights and move as rapidly as possible toward the ultimate goal of full realization of these rights. Under no circumstances should this provision be interpreted as allowing States the right to defer indefinitely efforts to ensure full realization. The State has the obligation to ensure on a continuous basis the progressive fulfillment of ESC rights.

Montreal Principles on Women’s Economic, Social and Cultural Rights, Section 10. Intersectionality

Many women encounter distinct forms of discrimination due to the intersection of sex with such factors as: race, language, ethnicity, culture, religion, disability, or socioeconomic class. Indigenous women, migrant women, displaced women, and non-national or refugee women experience distinct forms of discrimination because of the intersection of their sex and race, or their sex and citizenship status. Women may also confront particular forms of discrimination due to their age or occupation; family status, as single mothers or widows; health status, such as living with HIV/AIDS; sexuality, such as being lesbian; or because they are engaged in prostitution. Intersecting discrimination can determine the form or nature that discrimination takes, the circumstances in which it occurs, the consequences of the discrimination, and the availability of appropriate remedies. To ensure that all women enjoy the benefits of their economic, social, and cultural rights, specific measures are needed to address the ways in which women are differently affected in their enjoyment of a right as a result of the intersection of discrimination based on sex with discrimination based on other characteristics.

Where the text of a substantive right does not prescribe the particular steps the State must take to achieve its fulfillment, the Covenant requires both obligations of **conduct and result** and the State must show that the steps it is taking are in line with its capabilities.³⁷ The obligation of conduct requires the State to take action that is likely to result in realization of ESC rights, e.g. establishing a policy to progressively increase women’s access to acceptable, affordable, accessible and quality health care. The obligation of result requires that the State meet specific targets established to meet the substantive standard, e.g. ensuring that more women, including particular groups of women, are able to access to medical treatment.

The CESCR has stated that although the term “progressive realization” recognizes that full realization of all economic,

social and cultural rights will generally be achieved over a period of time, this should not be misinterpreted as depriving the obligation of all meaningful content. “It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.”³⁸

✓ **Maximum Available Resources**

The CESCR has noted that although availability of resources serves as a measure by which to assess the steps taken, it does not alter the immediacy of the obligation and cannot be used to justify inaction. Where resources are demonstrably inadequate, the State must ensure the widest possible enjoyment of ESC rights under the circumstances. Even in times of severe resource constraints, such as now with the current economic crisis, States must adopt targeted

Example of Progressive Realization in Practice

In a case decided by the European Committee on Social Rights, the international body recognized that implementation by France of legislation relating to provision of education for persons with disabilities was extremely poor³⁹. The Committee ruled that the Government’s overall lack of progress in the area constituted a violation of the Charter, namely the right of persons with disabilities to education, the right of children and young persons to education, and the right of all persons to non discrimination. Although the Committee noted that the realization of the right was “exceptionally complex and particularly expensive”⁴⁰, and because of this the Government was permitted some flexibility; it still required that realization of social rights must occur within a “reasonable time, with measurable progress and to an extent consistent with the maximum available resources”⁴¹.

programs to protect the most disadvantaged and marginalized members of society.⁴²

Therefore, even if the State has moved forward in ensuring women’s ESC rights, if it has not done so to the maximum extent of all available resources, then it is in breach of this obligation.⁴³ For instance, a State’s systemic failure to reduce maternal mortality and provide access to quality maternal healthcare breaches its international obligations. The case study of *Alyne da Silva Pimentel v. Brazil*, decided by CEDAW in 2011 (see page 102) is an example of this point. In that case CEDAW recognized that despite Brazil’s significant efforts in areas of public health, its failure to prioritize reduction of maternal mortality and to devote the maximum available resources to guarantee that women can go safely through pregnancy and childbirth⁴⁴ created a violation.⁴⁵

Furthermore, the phrase “to the maximum of its available resources” refers to both the resources existing within a State as well as those available from the international community through international cooperation and assistance.”⁴⁶ Thus, resource availability should take into account budgetary availability but also the possibility for international cooperation, private resources and technical assistance.⁴⁷

✓ **Due Diligence**

An important component of a State’s positive obligations under the CEDAW Convention, is the principle of due diligence, as articulated in General Recommendation 28:

“Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omission may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work.”

Further, this obligation has been more recently elaborated in the context of gender-based violence. States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence. In *Ms VK v.*

Bulgaria the CEDAW Committee observed that States parties can be held responsible for private acts if they fail to act with due diligence to prevent violations of women's rights or to investigate and punish acts of violence against women.

As described in CEDAW's General Recommendation 19, "State parties must take reasonable steps to prevent human rights violations, investigate, impose the appropriate punishment and provide adequate redress to the victims." This is an area of State obligation which needs further development and definition, but in principle, this obligation will be applicable at a minimum in the contexts described above and perhaps more broadly.

✓ **No Retrogressive Measures**

The adoption of measures that reduce women's access to or enjoyment of their economic, social or cultural rights constitutes a violation.⁴⁹ The CESCR has interpreted that "[i]f any deliberately retrogressive measures are taken, the State Party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State Party's maximum available resources."⁵⁰

For example, in GC 19 on social security, the CESCR indicated that in evaluating retrogressive measures, it will examine whether: "(a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right...an unreasonable impact...or whether an individual or group is deprived of access to the minimum essential level...; and (f) whether there was an independent review of the measures at the national level."⁵¹

✓ **Minimum Core Obligations**

The "minimum core content" of a right refers to the

minimum essential levels of each substantive right, which must be guaranteed by the State.⁵² In this regard, the CESCR has stated that 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."⁵³ The CESCR has emphasized that "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*."⁵⁴

As the case study *Alyne da Silva Pimentel v. Brazil*⁵⁵ shows (see page 102), States have to ensure access to quality medical treatment in conditions of equality and ensure appropriate services to women in connection with pregnancy and childbirth including pre-natal services and timely emergency obstetric care. The government "cannot, under any circumstances whatsoever, justify its non-compliance with core obligations," particularly the

right to health⁵⁶ and should devote the maximum available resources to guarantee that women can safely experience pregnancy and childbirth.⁵⁷

Though the substance of what the minimum entails for each substantive right remains in development, in the meantime, the minimum core concept acts as a burden-shifting device: if a State asserts that it has been unable to meet the minimum core obligation due to resource constraints, it is up to that State to demonstrate that it had attempted to use all available resources for the purpose of ensuring core rights for all, particularly the most vulnerable.⁵⁸

Most importantly, minimum core obligations should be considered a "floor"—meaning if conditions fall below this level, it will be *prima facie* (presumptive) evidence of a violation and the burden would fall upon the State to prove that they have attempted to meet this minimum using maximum available resources.⁵⁹ Once a State has met these very minimum requirements, it is still obligated to continuously realize ESC rights utilizing maximum available resources.

Some human rights advocates are skeptical of this framework, concerned that rather than establishing a floor it will

While the full realization of economic, social and cultural rights may be achieved progressively; deliberate, concrete and targeted steps must be taken immediately to meet the obligations defined in the Covenant.

establish a ceiling, where once States meet these basic levels they will not attempt to improve conditions further. This is a valid concern and one to which all human rights advocates must remain vigilant. The duty of progressive realization within maximum available resources continues after the minimum core obligations are met. Further minimum core obligations can be used to create pressure for immediate action by a State following ratification of the Covenant. Therefore, the concept of the minimum core may offer a useful short or mid-term strategy in which enjoyment of human rights in many contexts would be improved by simply meeting these essential levels, with an eye to demanding continuous implementation and fulfillment after these core obligations are met.⁶⁰

Maximum Available Resources

In assessing the State's obligation to take steps to the maximum of available resources, and whether they are "adequate" or "reasonable," the Committees may take into account the following considerations:

- (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;
- (b) Whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) Whether the State Party's decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State Party adopted the option that least restricts Covenant rights;
- (e) The time frame in which the steps were taken;
- (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were nondiscriminatory, and whether they prioritized grave situations or situations of risk.

Source: CESCR, An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant, U.N. Doc. E/C.12/2007/1 (21 September 2007).

For example, in the countries falling into the "least developed" category, claims brought under OP-ICESCR using the minimum core requirement to pressure their State to ensure basic nutritional requirements of school children, pregnant women and lactating mothers could be an important point of leverage. Further, in conflict or post-conflict countries, where funding has been prioritized for military expenditures often at the expense of basic needs, minimum core obligations could be useful to pressure for re-orientation and prioritization of available funding. However, in some contexts, particularly in more developed countries, the argument of the "reasonableness" of government action and the duty to take positive measures may be more useful and better address women's equality and substantive fulfillment of ESC rights.⁶¹

2.4 A Coherent Approach to Women's ESC Rights

As demonstrated by the overview of rights and obligations above, much of the framework for understanding State obligations as they relate to women's economic, social and cultural rights under both mechanisms is quite similar, particularly when a substantive equality approach is utilized. The framework of substantive equality allows for a nuanced understanding of how violations of economic, social and cultural rights may be experienced by women in various social and historical contexts, with various identities, while also integrating clear State obligations related to both conduct and result and to take positive measures to remedy these violations. Although its application under each treaty may not be identical, a thorough understanding of the substantive equality lens itself can be applied to all women's human rights claims to ensure that the remedy demanded, and the means used to implement the remedy, reflect the claimant's articulation of her situation and her needs.

Coherence is clearly important for claimants and rights holders in developing strong legal arguments on women's economic, social and cultural rights under either instrument. As the scope and obligations related to particular rights are developed through General Comments/Recommendations, Concluding Observations or under the Committees' views under both Optional Protocols, it is important that these developments are integrated in the understanding of that right throughout the treaty body system. This coherence

will also support domestic level courts in applying international legal standards at the national level and parliamentarians in designing policies which reflects the State's international legal obligations. In addition, Committee members will benefit from a more consistent interpretation of obligations during periodic reviews or through individual or inquiry procedures.

Furthermore, although CEDAW is an integrated treaty, meaning it includes both civil and political rights as well as economic, social and cultural rights, having a comprehensive understanding of the rights and obligations in both treaties can provide a more complete overview of State obligations for women's ESC rights. Furthermore, CEDAW adds value to women's ESC rights claims by allowing for interpretations which recognize the interrelated nature of civil and political and ESC rights. This helps to inform interpretations of women's rights by the CESCR and contributes to bridging the artificial divide between these rights in practice. Because the ICESCR provides the definitions of the full scope of the substantive content of each right and States' obligations in relation to ESC rights, using these documents in tandem to provide reference to the scope of each right can strengthen arguments made with regard to specific elements of State duties.

For example, although Article 12 of CEDAW creates the State obligation not to discriminate in the provision of health-care services and General Recommendation 24 further elaborates on a State's obligations for this Article,⁶² only Article 12 of the ICESCR and subsequent General Comment 14 lay out the normative content of the right to health: such as, it must be universal, non-discriminatory, available, accessible (both physically and financially), and of good quality.⁶³ While CEDAW is critical in defining States obligations with regards to substantive equality and non-discrimination, the ICESCR is necessary to elaborate the content of economic, social and cultural rights.

The integration of both the concepts of substantive equality and of temporary special measures from CEDAW into the articulation of State obligations under the ICESCR further shows the necessity of taking a holistic approach when addressing women's ESC rights. CEDAW provides a deeper analysis of the roots and multiple manifestations of discrimination against women in the protection, promotion and fulfillment of women's human rights. Therefore, in bringing

Competing Needs

As an advocate for women's ESC rights, you will find yourself confronting the reality of competing needs in relation to the realization of ESCR. Because of the nature of most economic and social rights, substantial funding and support will be required to ensure full realization. Inevitably, as you begin to call on your State, developed or developing, to realize women's ESC rights, they will claim an inability to do so, possibly based on competing needs and limited resources. While these claims of limited resources must be challenged, what are advocates to do in situations of truly limited funds?

An example of this question of approach can be examined in the ESCR Committee's response to the raising of school tuition in Germany which they examined during the May 2011 review session. The Committee was making additional recommendations to Germany on lowering the high rate of school fees, which had been raised by the State in the previous two years in the context of the financial crisis. Within this economic context, the CESCR concluded that schools fees should not be increased and the State should continue toward abolishing fees altogether.

In addition, there is precedence at the national level for the argument that financial crisis cannot be the basis for the retraction of existing social supports. In case no. 2000-08-0109 before the Constitutional Court of Latvia, employers were not paying into a social assistance fund for their employees because of the current economic crisis. The Court found that despite the financial situation, the State must ensure proper oversight and enforcement of legislation which requires businesses to maintain their contributions to the social assistance system.

Your approach to advocating for women's ESC rights—arguing for immediate implementation or progressive implementation over time—will largely depend on the context in which you are working, including: the extent of available resources of your State, friendliness of the government to women's ESC rights issues and whether there is widespread popular support for these issues.

attention to women's ESC rights under the ICESCR, a claim or shadow report will be strengthened by integrating standards of non-discrimination and understandings of intersectionality from CEDAW.

The need for this coherence is also evident in the fact that some claims of violations of women's economic, social and cultural rights can potentially be brought to either Committee. For example, if a woman experiences a violation of her right to healthcare because the State's policy only extends maternity leave benefits to those women in formal employment, she would be able to bring a claim under Articles 7, 10 and 12 of the ICESCR or Articles 11 and 12 of CEDAW. Or, if a woman experiences domestic violence and has no means of escaping the violence because the State has failed to ensure she has the legislative and practical means to access emergency and longer-term housing, she could bring a claim under Articles 2(2), 3, 11(1) and 12 of the ICESCR or Articles 2(a)(b)(e), 3, 5(a), and 16 of CEDAW. Therefore, it is important that the understanding of the scope of the rights and obligations under both of these mechanisms are consistent. Although the articulation of the right itself and duty of the State might not be exactly the same under each instrument, each Committee be made aware of interpretations of that right under other mechanisms in its evaluation of the communication or inquiry. This will contribute to the development of coherent and meaningful standards, which allow States to better meet their obligations and claimants to have better clarity on the scope of their rights.

The ICESCR, CEDAW and their Optional Protocols are powerful tools in demanding that women's economic, social and cultural rights be implemented and in providing access to justice for violations. A holistic understanding of the rights and obligations contained in these two Conventions, used in conjunction with each other, can increase accountability for women's ESC rights as well as provide the normative basis for demanding substantive advancement on women's human rights in a manner which reflects the critical importance of ESC rights in women's lives.

Notes

¹ *Universal Declaration of Human Rights (UDHR)*, G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948).

² *Idem*.

³ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976

⁴ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

⁵ Rebecca J. Cook, (ed.), *HUMAN RIGHTS OF WOMEN*, (Philadelphia: Univ. of Penn Press, 1994), p. 21.

⁶ Vienna Declaration and Programme for Action, adopted by the World Conference on Human Rights in Vienna, (25 June 1993); UDHR, *Preamble*, supra n. 2 above.

⁷ See, e.g., *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v. City of Johannesburg and others*, (2009) CCT 24/07; and *Khosa & Ors v Minister of Social Development & Ors.*, 2004(6) BCLR 569 (CC); *Sentencia T-760 of 2008 and Sentencia T-568 of 2006; Case of The Yean And Bosico Children V. The Dominican Republic*, Inter-American Court Of Human Rights, Judgment of September 8, 2005; *The Mayagna (Sumo) Awas Tingni Community Case*, Preliminary Objections Judgment of February 1, 2000; *Caso Comunidad Indígena Yakye Axa v. Paraguay*, Inter-American Court Of Human Rights, Judgment of 17 of June 2005; *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006; *European Roma Rights Centre v Greece*, Complaint No. 15/2003; *International Association Autism Europe v. France*, Complaint No. 13/2002; *International Commission of Jurists v Portugal*, No. 1/1998; and *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 13/2003; *Ms. A.S. v Hungary*, CEDAW/C/36/D/4/2004, Communication No. 4/2004. See, *F. H. Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984 (9 April 1987), U.N. Doc. Supp. No. 40 (A/42/40) at 160 (1987); and *Länsman et al v Finland*, Communication No. 511/1992, UN GAOR, 52nd Session, UN Doc. CCPR/C/52D/511/1992, opinion approved the 8 November 1994.

⁸ Convention on Rights of Persons with Disabilities, Articles 4-5; See also, Sandra Liebenberg, *SOCIO-ECONOMIC RIGHTS JURISPRUDENCE UNDER A TRANSFORMATIVE CONSTITUTION*, (Claremont: Juta & Co. Ltd, 2010,) at p. 54-59.

⁹ For a complete listing of International and Regional Human Rights treaties, see: <http://www1.umn.edu/humanrts/treaties.htm>.

¹⁰ Article 14 of the Association of South East Asian Nations (ASEAN) Charter, adopted in Singapore on 20 November 2007, established the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2010. The AICHR is currently drafting the ASEAN Human Rights Declaration.

¹¹ See also *Report of the United Nations High Commissioner for Human Rights 2008*, UN Doc E/2008/76, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/374/93/PDF/N0837493.pdf?OpenElement>

¹² Montreal Principles on Women's Economic, Social and Cultural Rights, *Human Rights Quarterly*, 26 (2004) 760–780, at p. 763.

¹³ See, Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 14: The right to the highest attainable standard of health*, Twenty-second session, U.N. Doc. E/C.12/2000/4 (2000), para. 16; and CESCR, *General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, U.N. Doc. E/C.12/GC/20 (2009), at para. 7 and para. 20 in which the CESCR states that, for instance, "...the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men".

¹⁴ Audrey Chapman and Sage Russell, (eds.), *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS*, (Oxford: Intersentia, 2002), at p. 6.

- ¹⁵ Victor Abramovich, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System," *Sur International Journal on Human Rights*, Vol. 6, No. 11, (Dec. 2009).
- ¹⁶ See, Gwen Brodsky and Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty," *Canadian Journal of Women and the Law*, Vol. 14 (2002), pp. 184-219.
- ¹⁷ For example, in Canada, the Supreme Court rejected the British Columbian provincial government's arguments that the right to equality did not require governments to allocate resources in healthcare in order to address disadvantages of particular groups such as the deaf and hard of hearing (*Eldridge vs. British Columbia* (Attorney General) [1997] 2 S.C.R. 624, par. 87). Brazilian courts have held that the right to health of children requires a higher level of prioritisation and that to "submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality" (BRAZIL, Resp. 577836, 2003).
- ¹⁸ See Brodsky and Day, supra n. 17, above, "Deprivations associated with lack of access to the means necessary to meet basic needs should be understood to engage rights to security of the person, no matter who the affected individual is. However, the particular and disproportionate effects on women of being in a condition of extreme economic vulnerability require recognition that government denials of adequate social assistance constitute a violation of women's right to equality."
- ¹⁹ Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 25* On article 4, paragraph 1, on temporary special measures, U.N. Doc. HRI/GEN/1/Rev.7 at 282 (2004), para 19; See also, Leilani Farha, "Women Claiming Economic, Social and Cultural Rights—The CEDAW Potential," in Malcolm Langford (ed), *SOCIAL RIGHTS JURISPRUDENCE EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW* (Cambridge: Cambridge Univ Press, 2008) p. 553-68.
- ²⁰ CEDAW, General Recommendation No. 25, Idem, para 10.
- ²¹ CEDAW, General Recommendation 25, supra n. 20 above, at para. 20.
- ²² CESCR, *General Comment 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (Thirty- fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005), para 17.
- ²³ Idem, para 10-15.
- ²⁴ CESCR, *General Comment 19 : The right to social security* (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008), para 32; CESCR General Comment 20, supra n. 14 above, para 8-9.
- ²⁵ CESCR, General Comment 16, supra n. 23 above, para. 15.
- ²⁶ CESCR, General Comment 20, supra n. 14 above, para 8(b).
- ²⁷ CEDAW, *General Recommendation 28: on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, (16 December 2010); and CESCR, General Comment 20, supra n. 14 above.
- ²⁸ Michael Ashley Stein, "Disability Human Rights," *California Law Review*, Vol. 95, p. 75-122 (2007).
- ²⁹ *Joelle Gauer and Others v. France*, European Court of Human Rights, App No 61521/08, Amicus Brief submitted by Center for Reproductive Rights, European Disability Forum, INTERIGHTS, International Disability Alliance, and Mental Disability Advocacy Center, (16 August 2011) available at: <http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Gauer%20v%20France%20Submission%20ECHR%20FINAL.pdf>
- ³⁰ CESCR, General Comment 16, supra n. 23 above, para 18.
- ³¹ Idem. para 19.
- ³² Idem. para 20.
- ³³ ICESCR, Article 2, supra n. 4 above; and CESCR, *General Comment 3, The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), para. 1.
- ³⁴ CESCR, General Comment 16, supra n. 23 above, para 16.
- ³⁵ CESCR, General Comment 3, supra n. 33 above.
- ³⁶ CESCR, General Comment 16, supra n. 23 above, para 21.
- ³⁷ Philip Alston and Gerard Quinn, "The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights," *Human Rights Quarterly*, Vol. 9 (1987) at p. 185
- ³⁸ CESCR, General Comment 3, supra n. 33 above.
- ³⁹ European Committee on Social Rights, *International Association Autism Europe v. France*, Complaint No. 13/2002, November 4, 2003. The overwhelming majority (80-90 percent) of young adults and children with autism had no access to adequate educational services. Based on current rates of placements in special education, Autism-Europe estimated that it would take 100 years to erase the deficit in the official waiting list, which then stood at 39 514 persons (even higher under the official WHO definition). It was also argued that insufficient provision had been made for mainstreaming of education, early intervention, and teacher training and that the funding formula for special education took insufficient account of the number of children in need. The Government of France acknowledged the above failings but pointed to new funding allocations and programmes, even though many of these were targeted at all people with disabilities.
- ⁴⁰ Idem. The Committee recalled that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. 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. State 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."
- ⁴¹ Idem. Noting that there had been twenty years of national debate on the subject, and that the Disabled Persons Act had been passed in 1975, the Committee found that there was an unacceptable and chronic shortage of places. It also chided the Government for its restrictive definition of autism. The Committee was not, however, prepared to censure France's method of funding special education through the State health insurance system, noting that this was a matter for State discretion.
- ⁴² CESCR, *An Evaluation Of The Obligation To Take Steps To The "Maximum Of Available Resources" Under An Optional Protocol To The Covenant*, U.N. Doc. E/C.12/2007/1 (21 September 2007) at para 4.
- ⁴³ See, for instance, African Commission on Human and People's Rights, *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola*, Communication No. 159/96 (11 November 1997). The communication addresses the illegal and arbitrary mass expulsion of West African nationals from Angola in 1996 mass expulsion, which included children, woman, and elderly, without distinction. The Commission conceded that African States in general and the Republic of Angola in particular are faced

with many challenges, mainly economic which compel States to resort to radical measures aimed at protecting their nationals and their economic from non-nationals. Whatever, the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Therefore, it concluded that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations “constitute a special violation of human rights.” This type of deportations calls into question a whole series of rights recognized and guaranteed in the Charter; such as the right to property, the right to work, the right to education and the principle according to which “the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical and moral health.” See: http://www.achpr.org/english/_info/decision_Article_18.html

⁵⁹ CESCR, General Comment 3, supra n. 33 above, para. 10.

⁶⁰ Chapman and Russell, supra n. 15 above, at p. 9.

⁶¹ Liebenberg, supra n. 9 above, at p. 174.

⁶² CEDAW, General Recommendation 24, supra n. 56 above.

⁶³ CESCR, General Comment 14, supra n. 14 above, para. 12 (a-d).

⁴⁴ CEDAW, *General Recommendation 24: Women and health*, 20th Session. U.N. Doc. A/54/38 (1999), para 27.

⁴⁵ Accordingly, when analyzing the right to house and eviction measures adopted by State parties, the CESCR stated that where an eviction is implemented, “... the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available”[emphasis added]. See CESCR, *General Comment No. 7: Forced evictions, and the right to adequate housing* (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), para 16. In other words, upon eviction, not only is a State Party to the ICESCR obligated to provide housing (four walls and a roof, for example) to evictees, they must also ensure that the alternative housing that is provided is adequate.

⁴⁶ CESCR, “Maximum Available Resources,” supra n. 36 above.

⁴⁷ See, for example, CESCR, General Comment 19, supra n. 25 above, para. 61. “The Committee also wishes to emphasize that it is particularly incumbent on State Parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical, to enable developing countries to fulfill their core obligations.”

⁴⁸ CEDAW, *Ms. V.K. v. Bulgaria*, Communication No. 20/2008, (25 July 2011).

⁴⁹ Montreal Principles, supra n. 13 above, para 29.

⁵⁰ CESCR, *General Comment 15: The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002).

⁵¹ CESCR, General Comment 19, supra n. 25 above, p. 42

⁵² “The concepts of core content and minimum core content are not unique to ESC rights. An example of minimum core content in the area of civil and political rights can be found in the right to freedom from arbitrary detention. One element of the core content of this right is that a warrant for a person’s arrest must be obtained by the state and presented to the individual. Circle of Rights, Economic, Social and Cultural Rights Activism: a Training Resource, Module 8, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module8.htm>

⁵³ CESCR, General Comment 3, supra n. 33 above, para. 10.

⁵⁴ Idem.

⁵⁵ CEDAW, *Alyne da Silva Pimentel v. Brazil*, (Communication No. 17/2008).

⁵⁶ CESCR, General Comment 14, supra n. 14 at para 14.

⁵⁷ CEDAW, *General Recommendation 24: Women and health*, (20th Sess., par 27, U.N. Doc. A/54/38 (1999).

⁵⁸ CESCR, General Comment 3, supra n. 33 above, para. 10, although in later general comments, such as on in General Comment 14, supra n. 14 above, para 47, and General Comment 15, supra n. 49 above, para 40, the CESCR has moved more toward the position that there is no justification for failing to meet minimum core obligations.



Part Three: Optional Protocols—Human rights complaints mechanisms

3

3. Optional Protocols— Human rights complaints mechanisms

3.1 What is an Optional Protocol?

To enable individuals, groups of individuals or other States to directly raise complaints of human rights violations with specific treaty bodies, a number of Optional Protocol's have been created which provide individual complaints mechanisms for relevant treaties. In the UN Human Rights Treaty System, Optional Protocols do not amend the text of the original treaty, but rather specify some obligations (a substantive protocol) or create additional mechanisms to monitor compliance with the original instrument (a procedural protocol). So far, under the international human rights system, five of the supervisory Committees (CCPR, CERD,

CAT, CEDAW and now CESCR) can, under given conditions, receive individual complaints.

An Optional Protocol is a supplementary and separate treaty to the main human rights treaty. It is necessary for a member State to sign and ratify the Optional Protocol, in addition to the main human rights treaty. Optional Protocols provide an avenue of access to justice for individuals at international level.

The procedures they provide for can include an individual communication, an inquiry procedure and an inter-state procedure. The communications procedure enables individuals or groups of individuals to bring a complaint before the relevant treaty Committee alleging a violation of their human rights by the State. The inquiry procedure authorises the treaty Committee to investigate allegations of grave or systematic violations of human rights by the State Party. Under OP-ICESCR, a State Party must have explicitly “opted-in” to this procedure for it to be available. Included in some Optional Protocols, there is an inter-state procedure such as the OP-ICESCR which allows one State Party to the mechanism to bring a complaint against another State Party where that State has not fulfilled its obligations under the Covenant. However, this procedure must be explicitly accepted by both State Parties.

The Table at left lists human rights treaties that have individual complaints mechanisms.

There are also procedures for complaints which fall outside the treaty body system, through the special procedures under the Human Rights Council Complaints Procedure and through the Commission on the Status of Women.¹

3.2 Common and differing features of OP-CEDAW and OP-ICESCR

The OP-CEDAW and the OP-ICESCR both allow for a communications procedure and an inquiry procedure. The procedures for the CEDAW and ICESCR Optional Protocols are similar, but also contain slight differences (in bold).

Human Rights Treaties With Complaint Procedures

| Treaty | Individual Complaints Mechanism (individual communications) |
|--------|--|
| ICCPR | First Optional Protocol to the ICCPR |
| ICESCR | Optional Protocol to the ICESCR (also provides for an inquiry procedure) (opened for signatures in 2009) |
| CEDAW | Optional Protocol to the CEDAW (also provides for an inquiry procedure) |
| CERD | Article 14 of CERD |
| CRC | Optional Protocol to the CRC (opened for signatures in 2012) |
| CAT | Article 22 of CAT (also provides for an inquiry procedure) |
| CRDP | Optional Protocol to the CRPD |
| CMW | Art 77 of the CMW |
| CED | No individual complaints mechanism |

Part Three

Common and Differing Features of OP-CEDAW and OP-ICESCR

| Procedures | CEDAW | ICESCR |
|-----------------------|---|---|
| Communication | | |
| Interim Measures | Request for interim measures made by the Committee to the State Party prior to considering admissibility or the merits, where its necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. | |
| Admissibility | Complaint is in writing Complainant is not anonymous Complaint is submitted on behalf of an individual or group of individuals The facts occurred after the State Party agreed to the Optional Protocol, or the facts continued after that date The complaint is not manifestly ill-founded The claimant must be a victim of a violation of a right under the Convention | |
| | All domestic remedies are exhausted (or are unavailable or ineffective) | |
| | Limitation period: None | Limitation Period: Complaint must be submitted within 1 year of domestic remedies being exhausted |
| | The complaint has not been considered by the Committee or another international investigation or settlement procedure. | |
| Merits | Whether the matter is within the jurisdiction of the relevant treaty. | |
| | Whether the State has met its obligations under the relevant treaty. | |
| Remedies | Individual remedies aimed at redress and repairing the harm to the victim. | |
| | Systematic remedies (eg law reform) | |
| Friendly Settlement | Not available | The Committee makes available its offices to the parties to conduct conciliation with a view to reaching a mutually agreeable settlement |
| Inquiry | Information must be reliable State Party must not have opted out of the inquiry procedure Grave or systematic violation | Information must be reliable Grave or systematic violation State Party must have specifically opted-in to inquiry procedure |
| Inter-State Procedure | Not available | A State Party can submit a complaint about alleged violation committed by another State Party. Both States must have explicitly opted-in . |

Notes

¹ In 2007, the Human Rights Council adopted the “UN Human Rights Council: Institution Building” (resolution 5/1), which is the basis for the establishment of a new complaint procedure for addressing consistent patterns of gross and reliably attested violations of human rights in a country. Under the CSW Communications Procedure, any individual, non-governmental organization or network may submit a communication on an alleged violation of human rights affecting the rights of women (www.un.org/womenwatch/daw/csw/communications_procedure.html).