HUMAN RIGHTS SERIES

Economic, Social and Cultural Rights

A legal tool in the fight for social justice

Melik Özden

CETIM

CETIM Human Rights Collection

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Publisher's Note

This book, the work of Melik Özden, is based on the Human Rights Series that he drafted on economic, social and cultural rights, published by CETIM from 2005 to 2013.[1] In fact, this book is the fruit of the author's several decades of experience, acquired through his participation in numerous conferences, seminars, negotiations and other gatherings at the United Nations. For the current volume, the author also drew on contributions and exchanges with several persons: first of all Florian Rochat (former director of CETIM), as well as active members (committee, permanent team), the interns and the international militant network of the association, as well progressive lawyers. In other words, this book draws on the decades-long accumulated legacy of CETIM.

The drafting of the book, whose objective is to provide an overview of the economic, social and cultural rights recognized in the international and regional human rights instruments as well as their protection mechanisms at the national, regional and international levels, required a substantial updating of the original pamphlets to take into account the constant progress in the area of economic, social and cultural rights as well as in the jurisprudence. Further, the successful examples given are often the product of peoples' struggles and thus offer a better understanding of these rights, some of which continue, wrongly, to be characterized as non-justiciable or complex.

[1] Among them are those co-written with Christophe Golay and Simon Brunschwig.

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Melik Özden

Contents

LIST OF ABBREVIATIONS AND ACRONYMS

ASEAN	Association of Southeast Asian Nations
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
CPR	civil and political rights
CRC	Committee on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	United Nations Economic and Social Council
ESCR	economic, social and cultural rights
FAO	United Nations Food and Agriculture Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes

ILO	International Labour Organization
IMF	International Monetary Fund
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OSCE	Organization for Security and Cooperation in Europe
SDG	Sustainable Development Goals
TNC	transnational corporation
TRIPS	trade-related intellectual property rights
UDHR	Universal Declaration of Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

INTRODUCTION

The struggles of peoples for their freedom are very often obstructed and suppressed, but there are some that end in unequivocal success. Democratic conquests and the recognition of human rights are among the latter even though they still require considerable consolidation.

The adoption of the Universal Declaration of Human Rights (1948) responds, in part, to peoples' aspirations and opened up an avenue to the democratization of societies. The respect for human rights and fundamental freedoms, regardless of "race",[2] sex, language or religion, ranks among the objectives of the United Nations (UN Charter, Art. 3). With the codification of human rights, considerable progress, in particular in the area of legislation, has been registered, and mechanisms for their protection have been created at the national, regional and international levels.

Indeed, just like the other international and regional instruments mentioned in this book, the International Covenant on Economic, Social and Cultural Rights (ICESCR) is a legally binding treaty for States parties.[3]

In spite of the formal recognition by all States of the universality, indivisibility and interdependence of all human rights, economic, social and cultural rights (ESCR) continue to be neglected, and their implementation is not yet a reality for all throughout the world. However, these are fundamental rights, indispensable to allowing every human being to live in dignity.

Moreover, in our times almost half of humanity remains deprived of the essentials of life (water, food, housing, medical care etc.); these

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2 See the Right to Non-Discrimination (Part II, Chapter 2).

3 Ratified by 171 States: https://indicators.ohchr.org/

persons, to varying degrees depending on time and place, suffer discrimination in areas such as access to jobs, social security and schooling and are excluded from decision-making processes at all levels.

Among the foremost reasons for violations of ESCR is the failure to respect peoples' right to self-determination and the multiple forms of discrimination this entails. In spite of the formal independence of certain States, this right is not enjoyed by most peoples, not least those still under domination.

The purpose of this book is to give an overview of economic, social and cultural rights as codified in the ICESCR,[4] but also as recognized in international and regional human rights instruments. Its aim is educational, given that numerous movements and civil society groups as well as those defending the oppressed and the poorest of the poor are not fully aware of these instruments and their use, be it at national, regional or international level. Thus, this book is intended as a companion to accompany them in their daily struggles so that they can assert their elementary rights and demand that they be respected.

The first part of the book is devoted to the obligations of States and other actors in these areas, the obstacles to the implementation of ESCR, the mechanisms of protection at the national level as well as at the regional and international levels, and jurisprudence, chiefly examples arising from peoples' struggles. These struggles have made it possible not only to put an end to violations of the rights concerned, but also to clarify the scope of ESCR in their implementation.

The second part deals with the right of peoples to self-determination and the right to non-discrimination. The first

[4] https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights

underpins all human rights, and the second is operative in all areas of human rights.

The third part discusses each right according to its specificity (definition, content, pertinent norms, specific obligations of States etc.), analyzing its implications and presenting numerous examples of successful struggles.

It is important to note that progress in this area is not linear nor accomplished once for all time. Rather, history teaches us that we must not only fight to obtain recognition of our rights but also fight, continually, for their full implementation. It is thus a permanent struggle requiring constant vigilance if we wish to avoid regression and thwart the forces of obscurantist regimes and outright dictatorships. This is why citizen action and social movements are crucial for the respect and implementation of all human rights, in particular ESCR.

PART I

CHAPTER 1

STATES' GENERAL OBLIGATIONS

Generally speaking, the international human rights instruments comprise three levels of obligation: to ***respect***, to ***protect*** and to ***implement***. These obligations naturally apply to economic, social and cultural rights (ESCR).

States are duty-bound to "respect" and "guarantee" all human rights to all the persons on their territory and all those persons under their authority.[5] This involves nationals as well as non-nationals.[6] It holds for persons not on a State's national territory but under the jurisdiction of the said State (military occupations, trusteeship territories, peace-keeping missions etc.).

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has adopted General Comments on each of the specific rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR). As they will be discussed individually in each chapter devoted to the right in question, we shall limit the discussion here to States' general obligations.

A. Obligation to Respect

When a State becomes a party to an international human rights convention, votes in favor of a declaration or resolution at the United Nations General Assembly, or adopts a declaration during a United Nations summit conference (for example the Vienna World

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5 Stipulated in the Human Rights Committee's General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, §10.

6 However, Art. 25 of the International Covenant on Civil and Political Rights acknowledges the limiting of certain civil and political rights to "citizens", i.e. nationals.

Conference on Human Rights), the first measure it must take is to bring its national legislation into line with the commitments in the document it has adopted, unless the document is automatically and directly implemented under its legal system upon adoption. Under the Vienna Convention on the Law of Treaties (1969), a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (Art. 27).

The obligation to respect implies that States may not enact any arbitrary measure limiting the exercise of the right(s) in question.

States must also create instances charged with investigating violations of any of the rights in question and provide means of remedy for victims, in particular access to justice. The failure to prosecute perpetrators of violations of human rights is considered a failure by the State to meet its commitments in these areas. In this regard, the Human Rights Committee has asserted that "no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibilities."[7]

B. Obligation to Protect

The obligation to protect requires that States prevent any third party from impeding in any way the exercise of a human right, including economic, social and cultural rights. This can refer to individuals, State actors (third States), non-State actors (for example transnational corporations) or other entities.

C. Obligation to Implement

The obligation to implement entails the obligation to facilitate and to fulfill. Concretely, this means that the State must adopt political measures, including measures of promotion, of financial support

[7] Human Rights Committee's *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13, §18.

and, generally, any and all measures that can support the enjoyment of a given right by all individuals, by all communities and categories concerned (minorities, migrants, the elderly, children, persons with disabilities…).

D. Obligation of International assistance and Cooperation

Countries with inadequate resources (natural, financial or technical) to fulfill their obligations regarding ESCR must benefit from international cooperation in order to be able to remedy their situation. This is a matter of international solidarity among States, enshrined both in the United Nations Charter (Arts. 55, 56) and in the ICESCR (Art. 2.1).

CHAPTER 2

OVERSIGHT AND PROTECTION MECHANISMS

A. At the National Level

There are two types of oversight mechanisms at the national level: judicial and extra-judicial.

1. Judicial Oversight Mechanisms

In countries where human rights are recognized as constitutionally guaranteed rights or as components of another right or other rights recognized in the constitution (for example the right to life), it is theoretically possible to claim such rights before an administrative instance or before a judge at the local or national level.

In practice, the lack of knowledge of human rights among civil administrations and local judges makes this possibility elusive at the local level. However, if the civil administration and local judiciary do not recognize the right, it is possible to recur to national courts; this is provided for in numerous countries on the basis of their constitution.

2. Extra-Judicial Oversight Mechanisms

The extra-judicial oversight mechanisms available at the local level can play an important role in the protection of human rights in general and of ESCR in particular. The two main extra-judicial oversight mechanisms available at the national level are national human rights protection commissions and mediator offices (ombudsman or Defensor del Pueblo). These two mechanisms

together form what are called "national institutions of human rights protection". They exist in more than 100 countries. The Global Alliance of National Human Rights Institutions,[8] which bills itself as "coordinator and representative" of these institutions and which comprises 19 members, has set up a ranking procedure based on the Paris Principles.[9]

In countries where these mechanisms exist, the victims of violations of the rights involved can avail themselves of them by writing a simple letter or by orally presenting their case. These national institutions, although of varying effectiveness and independence, depending on the country, generally have a broad mandate allowing them to scrutinize the policies of the government and their effect on the rights in question and at the same time protect the victims through legal aid or mediation with the authorities. While some have a mandate limited to the defense of civil and political rights, the number of those also defending the implementation of economic, social and cultural rights is steadily increasing.

However, the absence of training for judges and lawyers in international human rights law complicates the implementation of the ICESCR in some countries where the international conventions are directly applicable at the national level, without the need to adopt specific laws (e.g. Switzerland).

B. At the Regional Level

On the African, European and American continents there are several human rights oversight and implementation mechanisms.

8 https://ganhri.org/

9 The Paris Principles require, among other things, independence and a broad representation of social forces in the composition and functioning of these institutions: https://www.ohchr.org/fr/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris

Victims of ESCR violations have the possibility to appeal to these mechanisms, directly or indirectly, under two conditions: 1. the State of which they are citizens must recognize the capacity of the mechanisms to receive individual and/or collective complaints; 2. the domestic (national) avenues of appeal must have been exhausted.

While the recommendations of most of these mechanisms - which are deemed "quasi-judicial" - are not binding, they exert moral pressure on the State, which generally executes them. There are even some States that do not implement court rulings (African, European and American) which are nonetheless binding for them. Although legal proceedings in these mechanisms are often costly and can take a long time, it is worth the trouble.

In fact, the "recommendations", "advisory opinions" and "rulings" of these mechanisms constitute the jurisprudence that makes possible advances in this area and improve the living conditions of many persons and communities. In this context, the mobilization of civil society and citizens is crucial to forcing governments to respect and concretely implement human rights in general and ESCR in particular.

1. On the African Continent

The human rights protection system in Africa is based on the African Charter on Human and Peoples' Rights, adopted in 1981[10] by the Organization of African Unity (known since 2002 as the African Union). It is one of the most progressive instruments, inasmuch as it addresses both ESCR and civil and political rights (CPR), but also covers the rights of peoples and the right to a healthy environment. It has been ratified by all the member States of the African Union except Morocco. The other human rights instruments constituting a normative framework within the African system are: the African

[10] Entered into force 21 October 1986: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_f.pdf

Charter on the Rights and Welfare of the Child,[11] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol),[12] and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).[13]

There are three main mechanisms for oversight and implementation of human rights within the African system: the African Commission on Human and Peoples' Rights, established under the African Charter; the African Court on Human and Peoples' Rights, established by the Protocol to the African Charter on Human and Peoples' Rights; and the African Committee of Experts on the Rights and Welfare of the Child, set up under the African Charter on the Rights and Welfare of the Child.

Created in 1987, the ***African Commission on Human and Peoples' Rights***[14] receives periodic reports from States parties, which must report on measures taken to fulfill all the rights recognized by the Charter, including ESCR. It is also authorized to receive complaints of violations of the rights protected by the Charter, both individual and collective, submitted by persons or groups of persons concerned directly or through civil society organizations. The Commission rules on the alleged violations and formulates recommendations for the accused State.

The ***African Court on Human and Peoples' Rights*** was created in 1998, and its statutes entered into force in 2004, but it became

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11 Adopted 11 July 1990; entered into force 29 November 1999.

12 Adopted 11 July 2003; entered into force 25 November 2005.

13 Adopted 23 October 2009; entered into force 6 December 2012. The African Union has also adopted two human rights treaties that have not yet entered into force: the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (29 January 2018) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (31 January 2016).

14 https://achpr.au.int/en/about

operational only in 2008. The Court is authorized to receive requests for reparation and compensation following violations of rights recognized in the African Charter and its additional protocol. The victims of violations of ESCR thus have the possibility to bring their cases before the Court. Out of 34 States that have ratified the protocol, only eight so far have recognized the jurisdiction of the Court.[15]

The ***African Committee of Experts on the Rights and Welfare of the Child*** is the oversight body for the African Charter on the Rights and Welfare of the Child. It was set up in 2002, and its mandate comprises two components: protection and promotion.[16] The Committee considers complaints relating to the rights of the child and receives periodic reports submitted by the States parties. It is also authorized to conduct inquiries and carry out field visits.

2. On the European Continent

The ***European Committee of Social Rights*** is entrusted with judging both the law and the practice of the States parties to the European Social Charter (revised in 1996). This document is focused in particular on labor law (Art. 1); trade union rights and labor relations (Arts. 2 to 10); the protection of health (Art. 11); social security and assistance (Arts. 12, 13, 14, 23); the right to free education at the primary and secondary levels (Art. 17.2); the right of disabled people to education, including professional training (Art. 15.1); the rights of migrants (Art. 19); and the right to adequate housing (Art. 31).

The 1995 protocol provides for a system of collective complaints (entered into force in 1998) which permits recourse to this instance[17] in the event of a violation of the Charter. The States parties to the

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15 https://www.african-court.org/wpafc/basic-information/

16 African Charter on the Rights and Welfare of the Child, Arts. 42, 45.

17 https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure

Charter[18] must submit a biennial report on its implementation in both law and in practice. The Committee adopts Conclusions following a review of the national reports and Decisions following collective complaints submitted by NGOs and trade unions.[19]

Set up in 1959, the ***European Court of Human Rights***[20] oversees compliance with the European Convention on Human Rights (ECHR) by its signatory States.[21] It deals with complaints (individual or collective, or from States parties) alleging violations of the provisions of the ECHR. While the Convention focuses on civil and political rights in particular, the Court can rule indirectly on ESCR through matters of civil and political rights depending on the case, such as the right to education (Art. 2 of Protocol No. 1), the prohibition of discrimination (Art. 14), the right to respect of one's private and family life (Art. 8) and freedom of thought, conscience and religion (Art. 9), the right to freedom of assembly and association (Art.11), etc. It can receive individual or collective complaints or complaints from States parties.

3. On the American Continent

The ***Inter-American Commission on Human Rights*** (1959) and the ***Inter-American Court of Human Rights*** (1979) monitor compliance

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18 42 of the 46 member States have ratified the European Social Charter. However, the four States that have not yet ratified it (Liechtenstein, Monaco, San Marino, and Switzerland) have nevertheless signed it. Only 16 out of 46 States have accepted the collective complaints procedure (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden). See: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=158

19 https://www.coe.int/en/web/european-social-charter/case-law

20 https://www.echr.coe.int/home

21 To date, 46 States have ratified the ECHR. Besides the European Union member States, this figure includes all members of the Council of Europe: https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=005

by States parties with the American Convention on Human Rights (1978) and its additional protocols. The Protocol of San Salvador (1998), which deals with economic, social and cultural rights, created formal protection mechanisms. It requires States parties to submit periodic reports to the organs of the Organization of American States (OAS) as well as to the Commission, regarding measures taken with a view to the progressive realization of ESCR (Art. 19).[22] Only violations of civil and political rights, protected by the American Convention on Human Rights, can be invoked before the Court and the Commission[23] with the exception of the right to education and trade-union freedom.[24]

However, Article 26 of the American Convention on Human Rights states: *"The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."*

The Commission has numerous means to promote and protect human rights: it can draft reports on the general human rights situation in member States; carry out visits in some of them to clarify or investigate matters of alleged violations; and draft thematic reports. With a view to avoiding irreparable harm to persons, it can request that States adopt preventive measures in serious and urgent cases (Rules of procedure, Art.25) and request that the Court adopt

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22 The reports are submitted to the OAS Secretary General, who sends them to the OAS Economic and Social Council and to the Inter-American Council for Education, Science and Culture as well as to the Commission.

23 IACHR, Individual Petition System Portal: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/mandate/petitions.asp

24 Inter-American Humans Rights System, https://www.oas.org/ipsp/images/English%20FAQs.pdf

provisional measures (American Convention on Human Rights, Art. 63.2) even if the case has not yet been submitted to the Court.

The Commission can also receive individual complaints filed by persons, groups and organizations. After reviewing them, it can issue recommendations. In the event of non-compliance by the State party, it can make the matter public or, if the State party has recognized the jurisdiction of the Court (so far, 20 States parties have done so), it can refer the case to the Court, which can then issue a binding ruling and impose on the State measures of redress.

Only States parties to the Commission have direct recourse to the Court. Victims thus have only indirect access, through the Commission. The Inter-American Court is also empowered to issue advisory opinions. Upon request from a State party, the Commission or an OAS member State, it can rule on the compliance of national legislation with the Convention or another human rights treaty of the Inter-American system. These rulings are not binding and their implementation depends on the political will of the State concerned, however, they carry strong political and moral authority with the result that these rulings are implemented in many cases.

4. On the Asian Continent

The ***ASEAN Intergovernmental Commission on Human Rights*** (2009) was initially charged with drafting the ASEAN Human Rights Declaration (2012)[25] then with promoting it. The Declaration covers civil and political rights, economic, social and cultural rights, the right to development as well as the right to peace and to cooperation for the promotion and protection of human rights.[26]

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[25] Association of Southeast Asian Nations, comprising Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

[26] https://asean.org/asean-human-rights-declaration/

The Commission comprises one representative from each ASEAN member State, elected for a three-year term. It holds two regular meetings per year and additional meetings if necessary, and answers to the ASEAN foreign ministers.[27]

As well, ASEAN has a Commission on the Promotion and Protection of the Rights of Women and Children (2010)[28] and a committee for the implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007).[29]

These various mechanisms are entrusted with promoting and formulating human rights; however, they have no investigatory power nor can they receive complaints. Nonetheless, the first two mentioned submit an annual report to the ASEAN foreign ministers meeting and the third to the ASEAN senior labor officers meeting.

C. At the International Level

1. The United Nations Human Rights Treaty Bodies

The United Nations has 10 expert committees called treaty bodies entrusted with oversight and implementation of United Nations human rights treaties and conventions.[30] Generally speaking, these bodies have means of action at their disposal:

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27 https://hrasean.forum-asia.org/mechanism/asean-intergovernmental-commission-on-human-rights/

28 https://hrasean.forum-asia.org/mechanism/asean-commission-on-the-rights-of-women-and-children/

29 https://hrasean.forum-asia.org/mechanism/asean-committee-on-migrant-workers/

30 Committee on the Elimination of Racial Discrimination; Committee on Economic, Social and Cultural Rights; Human Rights Committee; Committee on the Elimination of Discrimination against Women; Committee against Torture; Committee on the Rights of the Child; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Committee on the Rights of Persons with Disabilities; Committee on Enforced Disappearances. https://www.ohchr.org/en/treaty-bodies

i) the review of States parties' reports, submitted according to a set calendar, and the drafting of recommendations so that the State party may remedy any insufficiency and improve its performance in the implementation of the convention;
ii) the drafting and adoption of General Comments on the scope and content of the rights enshrined in the conventions in order to facilitate their understanding by the public institutions responsible for implementing those rights;
iii) the review of individual and/or collective complaints regarding violations of the rights enshrined in the treaties, on condition that the State party recognizes the jurisdiction of the committee with which the complaint has been filed.

Certain committees are also authorized to receive inter-State complaints and to conduct field missions. All these mechanisms are based in Geneva (Switzerland), and the Office of the High Commissioner for Human Rights provides secretariat services.

Although the United Nations human rights treaties have the force of law for the States that have ratified them, the committees – unlike the World Trade Organization – have no way of obliging States to execute committee decisions and thus implement the rights in question. Such actions depend on the political will of the State concerned, hence the importance of mobilizing civil society organizations to demand that their governments effectively implement human rights in general and ESCR in particular.

The role of civil society organizations is crucial in the work of these bodies, during the presentation of States' reports and the follow-up adoption of the recommendations as well as during the presentation and follow-up of complaints.

It should be noted that certain treaty bodies are more open than others to civil society participation. Generally speaking, civil society organizations can present parallel reports (or alternatives to States'

reports), intervene with the body depending on the possibilities offered, and attend the discussions between a State's representatives and the body's members. They must also provide at the national level for follow-up to the recommendations if they wish them to be implemented by their governments in order to transform or at least concretely improve the lives of the population groups in question. This sort of follow-up exerts *de facto* pressure on governments that are often not "motivated" to take the recommendations into account.

Among the bodies mentioned, the ***Committee on Economic, Social and Cultural Rights*** (CESCR) constitutes the primary United Nations body devoted to these rights. Established in 1985, it comprises 18 independent experts elected by the States parties to the International Covenant on Economic, Social and Cultural Rights. It meets twice a year for three weeks. All States parties to the Convention are required to submit an initial report to the Committee within two years of their acceptance of the Covenant and then every five years. The report covers measures taken by the State party to implement the rights enshrined in the Covenant. The Committee considers the report of the State party, questions its representatives and gives recommendations.[31] The optional protocol to the ICESCR, adopted by the United Nations General Assembly in 2008, allows individual and collective complaints to be filed with the CESCR.[32] This protocol, which entered into force in 2013, has so far been ratified by 26 States and signed by another 24.[33]

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31 All reports of States parties as well as the Committee's recommendations and General Comments are available at: https://www.ohchr.org/en/treaty-bodies/cescr

32 Christophe Golay, The optional protocol to the International Covenant on Economic, Social and Cultural Rights, Geneva: CETIM, 2008: https://www.cetim.ch/the-optional-protocol-to-the-international-covenant-on-economic-social-and-cultural-rights-icescr/

33 https://indicators.ohchr.org/

Occasionally, other United Nations treaty bodies are required to deal with ESCR. Thus, it is worth discussing them briefly.

The ***Committee on the Elimination of Racial Discrimination*** (CERD) was the first United Nations treaty body to be set up. Its primary mandate is oversight of compliance by States parties to the International Convention on the Elimination of All Forms of Racial Discrimination.[34]

Besides examining the periodic reports, under Article 14 of the Convention,[35] in the event of discrimination affecting civil and political rights or economic, social and cultural rights, the CERD can receive individual and collective complaints.

The ***Human Rights Committee*** oversees the implementation of the International Covenant on Civil and Political Rights.[36] Under Covenant Article 41, the Committee can also consider inter-State communications (complaints) and, in accordance with its optional protocol, communications from individuals. Violations linked to ESCR such as the right to life (Art. 6), the principle of non-discrimination (Art. 26) and minorities' rights (Art. 27) can also be referred to the Committee.

The ***Committee on the Rights of the Child*** (CRC) is the United Nations oversight body that monitors implementation of the Convention on the Rights of the Child[37] by its States parties;

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[34] Adopted in 1965; entered into force in 1969; ratified to date by 182 States: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial

[35] Under this article, the State party must make a declaration to recognize the jurisdiction of the CERD.

[36] Adopted in 1966; entered into force in 1976; ratified to date by 173 States: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[37] Adopted in 1989; entered into force in 1991; ratified to date by all member and non-member States of the United Nations except the United States: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-

children's rights include economic, social and cultural rights. It also monitors the implementation of the Convention's two optional protocols, one regarding the involvement of children in armed conflicts, the other regarding the sale and prostitution of children and child pornography. The CRC considers the periodic reports submitted by the States parties to the Convention and the complementary reports by the States that have ratified the two protocols. This body is empowered to receive complaints, both individual and collective, relating to these instruments.

The ***Committee on the Elimination of Discrimination against Women*** (CEDAW) has the task of overseeing the implementation of the Convention on the Elimination of All Forms of Discrimination against Women.[38] It considers the periodic reports submitted by the States parties and, since the entry into force in 2000 of the optional protocol, has been empowered to receive both individual and collective complaints in cases of discrimination concerning the rights listed, including ESCR.

The ***Committee on Migrant Workers*** (CMW) was created upon the entry into force in 2003 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[39] It covers most of the economic, social and cultural rights. All the States parties are required to submit to the CMW periodic reports on the implementation of the rights enshrined in the Convention. The CMW can also receive inter--State (Art. 76) and individual complaints (Art. 77), but only from nationals of a State party accused of violation of any of the rights enshrined in the

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rights-child

[38] Adopted in 1979; entered into force in 1981; ratified to date by 189 States: https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women

[39] Adopted in 1999: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers

Convention and only once 10 States parties to the Convention have recognized the CMW's jurisdiction in this area.[40] This Convention has so far been ratified by 58 States and signed by 11 others; however, no Western State is among them.[41]

The ***Committee on the Rights of Persons with Disabilities*** (CRPD) oversees compliance with the Convention on the Rights of Persons with Disabilities.[42] It reviews the periodic reports and is authorized to receive individual and collective complaints if the State in question has ratified the optional protocol to this convention. It is also authorized to carry out investigations "in the event of reliable evidence indicating serious and systematic violations of the rights enshrined in the Convention".

2. The Special Procedures of the United Nations Human Rights Council[43]

The special procedures are mandates dealing with specific themes (currently 45)[44] and countries (currently 14),[45] set up under the former Commission on Human Rights and, since 2007, continued under its successor body, the Human Rights Council (HRC). They monitor a given area of human rights (thematic mandates), or the human rights situation in a given State or region (country mandates). The mandate holders are empowered to conduct visits to countries (two to three missions per year) and draft specific reports on the realization or lack thereof of the rights in question in the visited

40 See https://www.ohchr.org/fr/treaty-bodies/cmw/communications-procedures

41 https://indicators.ohchr.org/

42 Adopted 13 December 2006; entered into force in 2008; ratified to date by 186 States: https://www.ohchr.org/fr/instruments-mechanisms/instruments/convention-rights-persons-disabilities

43 See also Melik Özden, The Human Rights Council and Its Mechanisms (Geneva: CETIM, 2008): https://www.cetim.ch/the-human-rights-council-and-its-mechanisms/

44 https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en

45 https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en

country. They are also empowered to receive complaints (called communications, in UN jargon).[46] The results of these activities are presented in the form of reports (annual reports, mission reports, complaint reports) by the mandate holders (special rapporteurs, independent experts, representatives of the United Nations Secretary-General and ad hoc working groups) to the Human Rights Council and often to the United Nations General Assembly, which reviews them publicly.

3. The Universal Periodic Review[47]

The Universal Periodic Review (UPR) is a mechanism, set up in 2006, by means of which the Human Rights Council "evaluates" every United Nations member State with regard to its human rights record. It is an intergovernmental mechanism that reviews 48 States per year. In November 2022, the Council began the fourth UPR cycle, which is scheduled to finish at the beginning of 2027. For this review process, the HRC becomes a working group, holding three sessions of two weeks each, after which it meets in ordinary plenary sessions.

The UPR is based on the Charter of the United Nations, the Universal Declaration of Human Rights, the international human rights instruments to which the State under review is party, the obligations and commitments voluntarily undertaken by States, especially when they are candidates for election to the HRC, and applicable international humanitarian law.

The review is carried out starting with a report presented by the State under review, which, in its drafting, is "encouraged to undertake wide-scale consultations at the national level with all stakeholders"; another report compiled by the Office of the High

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[46] https://www.ohchr.org/en/special-procedures-human-rights-council/what-are-communications

[47] See also Melik Özden, *The Human Rights Council and Its Mechanisms*, and the Human Rights Council website, https://www.ohchr.org/fr/hr-bodies/upr/upr-main.

Commissioner for Human Rights on the basis of information from United Nations bodies; and a document containing a compilation of "credible and reliable information provided by other interested stakeholders", also compiled by the Office of the High Commissioner and to which NGOs are invited to contribute.

A group of three Rapporteurs (called the troika), selected from among the members of the HRC by geographical distribution, "facilitate" the review.

At the end of the review, a final document is adopted, first by the working group, then by the HRC plenary. It comprises recommendations drafted by the participating States (mentioned by name). The State under review retains considerable power in that it can accept or refuse the recommendations.

4. United Nations Specialized Agencies

The realization and respect of human rights are among the purposes of the United Nations, declared in the Charter's first article, along with inter-State cooperation and support to States by the United Nations and its specialized agencies in order to promote, among other things, "a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health and related problems…" (Art. 55).

In this regard, the United Nations bodies and its specialized agencies[48] are required to contribute to the promotion and implementation of all human rights, including economic, social and cultural rights. As they are many and varied, we shall present here briefly the mandate of only two of them, which are directly concerned with economic, social and cultural rights and which have complaint mechanisms. Their practices in this area will be discussed in each chapter devoted to the right in question.

[48] See https://www.un.org/en/about-us/un-system

Created in 1919, the ***International Labour Organization (ILO)*** has as its primary mandate the drafting of international labor standards in the form of conventions (binding) and recommendations (non-binding) setting minimum standards of basic labor rights such as freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment and other standards addressing conditions across the entire spectrum of work-related issues. The ILO is unique among the specialized United Nations agencies because of its tripartite structure. It is run by a board of directors comprising 56 members, of whom 28 are from governments, 14 represent workers and 14 represent employers. The ten most industrialized countries (Brazil, China, France, Germany, India, Italy, Japan, Russia, the United Kingdom and the United States) have permanent seats, while the others are elected for a three-year term. The ILO executive board meets three times per year in Geneva and makes decisions related to the ILO's policies.[49]

The ILO has several follow-up mechanisms[50] for enforcing its norms:

i) the Committee on Freedom of Association considers complaints regarding trade union freedom and makes recommendations to the ILO Governing Body;
ii) the Committee of Experts on the Application of Conventions and Recommendations presents an annual report to the ILO Conference Committee on the Application of Standards;
iii) under the complaints procedure (against States), professional employer or worker organizations can submit to the ILO Governing Board a complaint against any member State which, in their opinion, has not satisfactorily implemented a convention that it has ratified;

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[49] See also "L'OIT: ses origines, son fonctionnement, son action" and the ILO website: https://www.ilo.org/global/about-the-ilo/WCMS_082364/lang--en/index.htm

[50] For further information: Melik Özden, The Right to Work (Geneva: CETIM, 2008).

iv) under the (inter-State) complaints procedure, a complaint against a member State which has not implemented a convention that it has ratified can be submitted by another member which has ratified this convention, by a delegate to the ILO Conference or by the Governing Board ex officio;
v) in accordance with its implementation mechanism regarding unratified conventions, the ILO urges States to ratify these conventions, and considers that States should observe them even if they have not ratified them; consequently, the ILO asks non-ratifying States to justify their non-ratification, pursuant to the ILO Constitution's Article 19.

Created in 1945, the ***United Nations Educational, Scientific and Cultural Organization (UNESCO)*** "contributes to peace and security by promoting international cooperation in education, sciences, culture, communication and information".[51] Monitoring of UNESCO's norms is carried out through the review of periodic reports from member States (Arts. VI (4) and VIII, UNESCO Constitution).[52] The Committee on Conventions and Recommendations, a subsidiary body of the UNESCO Executive Board, is charged with the review of the periodic reports submitted by the member States. In 1978, by virtue of decision 104 EX/3.3, the Executive Board created a complaints procedure for violations of human rights in the areas under UNESCO's purview, to wit education, science, culture and information.[53] The Committee also examines the cases submitted under that framework. Individuals, groups of individuals and NGOs, in their own name or in the name of victims, are authorized to submit requests to UNESCO. The Committee meets twice a year, and its work is strictly confidential, including the reports that it submits to the Executive Board and to

51 https://www.unesco.org/en/brief
52 https://www.unesco.org/en/legal-affairs/standard-setting/specific-cr-monitoring-procedure?hub=66535
53 https://www.unesco.org/fr/legal-affairs/cr-committee/104-procedure

the General Conference.[54] However, these two UNESCO governing bodies can allow the review of a complaint at a public meeting if it concerns "massive, systematic or flagrant violations of human rights".[55] So far, this has never been done. "It is also relevant to note that the UNESCO procedure is not treaty-based but rights-oriented; is not a judicial or quasi-judicial procedure but instead focuses on establishing and maintaining a dialogue with the State concerned; is almost entirely confidential; and the Committee comprises representatives of States and not independent experts."[56]

D. Obstacles to the Implementation of ESCR

Among the many obstacles to the realization of economic, social and cultural rights (ESCR), one can mention in particular the non-respect of peoples' right to self-determination; inequality in all its manifestations; "structural adjustment" programs; the unjust international economic order; discrimination of all sorts and the non-respect of human rights norms, especially economic, social and cultural rights and participatory democracy; the lack of resources and international cooperation; plus the economic development model promoted at the global level. These factors interact, often cumulatively, and have a negative impact on the socioeconomic situation of a given country and, consequently, on the enjoyment of the ESCR of its populations.

1. Non-Respect of the Right of Peoples to Self-Determination

The main obstacle to the realization of ESCR is the non-respect of the right of peoples to self-determination. The State is both guarantor and major actor in the implementation of these rights. If a State is to

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54 The General Conference comprises all the UNESCO member States and meets every two years. The member States are very often represented at the ministerial level: https://www.unesco.org/en/general-conference

55 E/CN.4/2005/WG.23/2, 22 November 2004, § 72.

56 Ibid., §74.

be able to fulfill its mission in this area, it must be able to exercise full sovereignty, which means having the necessary resources; it must have participatory democratic structures and respect them in practice. Yet, today, most States do not meet these criteria for several reasons: 1. a lack of political will (the State's structure being controlled by a government that does not respect the will of its population nor its commitments regarding economic, social and cultural rights; 2. the government in question is under external control or under embargo; 3. interference by States exerting power at the economic, political or military level, thereby preventing peoples' exercise of their right to self-determination and obstructing the sovereignty of the State that represents them; 4. corruption of elites; 5. lack of resources.

2. Inequality

All impartial studies indicate that in recent decades, inequality and poverty among countries and even within a single country have increased alarmingly. These are some recent figures.

> *The 10 % richest persons of the earth receive 52 % of the world's income, whereas the entire lower 50 % earn only 8 %. And an individual belonging to the 10 % richest earns on average 87,200 euros per year, whereas somebody belonging to the lower 50 % of incomes earns 2,800 euros. Wealth inequality is even more pronounced than income inequality. The lower half of the world's population is practically devoid of wealth for it possesses only 2 % of the total. On the other hand, the 10 % richest hold 76 %.*[57]

These figures need no comment, and unsurprisingly, the United Nations reports inform us that almost half of humanity cannot meet its essential needs such as food, water, housing, health and education. (See also Part III devoted to ESCR.)

[57] World Inequality Report (2022), coordination: Lucas Chancel, Thomas Piketty, Emmanuel Saez, Gabriel Zucma, https://wid.world/news-article/world-inequality-report-2022/

In other words, wealth redistribution (for example through taxation) and adequate budget allocations by governments are indispensable for the realization of economic, social and cultural rights.

3. Structural Adjustment Programs

Programs (or policies) of structural adjustment are intimately linked to the question of debt, given that they are designed and imposed by the IMF/World Bank on the countries of the Global South, officially, "to react to economic imbalances and especially to the deficit in the balance of payments of various countries", following the debt repayment crisis at the beginning of the 1980s.[58]

Nowadays, these "programs" are extended to indebted countries of the Global North such as Greece, yet their formulas are always the same regardless of the economic and social conditions of the country concerned: devaluation of the currency; reduction, or even abolition, of control over exchange rates; limitation of State intervention in the economy; elimination of price controls; elimination of financial support for family farming and rural development; privatization of public services, etc.

The consequences of these programs are devastating: reduction of public expenditures devoted to sectors such as water, education, health, food, social security, housing, transport, energy, and indeed their commodification, resulting in unaffordable prices for the impoverished populations; degradation of working conditions and undermining of trade union organizations; tax breaks for transnational corporations, which reduce the State's capacity to maneuver; lay-offs; mass exodus of rural populations into the cities, or abroad; destructuring of the economy and the general impoverishment of populations.

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[58] Melik Özden, *Debt and Human Rights* (Geneva: CETIM, 2007).

For the United Nations independent expert Mr. Fantu Cheru, structural adjustment, which has made possible the neoliberal counter-revolution,

> *goes beyond the simple imposition of a set of macroeconomic policies at the domestic level. It represents a political project, a conscious strategy of social transformation at the global level, primarily to make the world safe for transnational corporations. In short, structural adjustment programs (SAPs) serve as "a transmission-belt" to facilitate the process of globalization, through liberalization, deregulation, and reducing the role of the State in national development.*[59]

The United Nations Special Rapporteur on Extreme Poverty has stated that *"privatization often involves the systematic elimination of human rights protections and further marginalization of the interests of low-income earners and those living in poverty."*[60]

4. Unjust International Order

Since the 1990s, we have witnessed the onslaught of financial capital and the adoption of a vast panoply of international treaties favorable to transnational corporations (especially multilateral and bilateral agreements on trade and investment), and ignoring human rights.[61] These treaties have supplanted human rights norms, including the right of peoples to self-determination, and prevail over legislation intended to promote harmonious national development as well as human, political, economic, social, cultural and environmental rights.

To protect investors against "indirect expropriation" or the loss of "expected gains", these agreements have sapped the sovereign right of States to establish supporting policies regulating wages and social

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59 E/CN.4/1999/50, 24 February 1999, §31.

60 Report of the Special Rapporteur on Human Rights and Extreme Poverty, A/73/396, 26 September 2018.

61 See Melik Özden, *Transnational Corporation's Impunity* (Geneva: CETIM, 2016).

protection. In the same vein, with these treaties, States lose the sovereign faculty of recourse to their own national courts to settle litigation arising on their own territory.[62]

It should be noted that interventions by such institutions as the IMF, the World Bank, the OECD and the European Commission, in addition to successive United States governments, have played a key role in the adoption of such agreements. These accords have reinforced transnational corporations, which have progressively imposed their monopoly in practically all sectors and consequently control the bulk of production and marketing of goods and services at the global level. Further, these entities exert a powerful influence on most political and economic decisions and have become major actors in violations of human rights, in particular economic, social and cultural rights.[63]

5. Human Rights Responsibilities of Transnational Corporations (TNCs)[64]

The growth of the power of transnational corporations described above has occurred without a concomitant delineation of their responsibilities. Indeed, through complex corporate structures, the granting of special status to large TNCs in certain countries, the short-circuiting of national courts by transferring jurisdiction to arbitration tribunals, and disparities among countries at the legislative level, TNCs that commit human rights violations often escape legal action and therefore sanctions.

While it is obvious that transnational corporations are required to respect human rights, there is currently no mechanism to regulate and sanction them. Initiatives undertaken so far have been limited and far from adequate. The process under way since 2014 within the United Nations to draft a binding treaty has become bogged down

62 Ibid.
63 Ibid.
64 Ibid.

owing to the opposition of certain powerful States and to corporate lobbying.[65]

6. Discrimination and Non-Respect of Human Rights Norms, especially ESCR

The international human rights instruments are very clear on the principle of non-discrimination, and most of them have been ratified by the overwhelming majority of States. (See the chapter on non-discrimination.) Many States have enshrined them in national legislation.

> *Over 90 per cent of the Constitutions recognized at least one economic and social right. In around 70 per cent of the Constitutions, at least one economic and social right was explicitly justiciable and around 25 per cent of them recognized 10 or more justiciable economic and social rights.*[66]

Nonetheless, discrimination and violations of economic, social and cultural rights continue throughout the world. How does one explain this situation which, at first glance seems paradoxical? The answer to this question is the answer to the following question: who decides and implements public policy?

In fact, for human rights in general, and ESCR in particular, to be respected and concretely implemented, a democratic institutional and legislative framework (involving the State, public entities, etc.) and participatory (popular) processes are required, as well as adequate means (technical, financial, skills, etc.), not forgetting, of course, the political will of the pertinent authorities. If one leaves aside the lack of means, the structure and the functioning of many States do not correspond to this schema. Worse, some of them are

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[65] CETIM has been committed for several decades to the adoption of binding international norms on TNCs: https://www.cetim.ch/stoptncs-impunity-campaign/.

[66] Report of the Special Rapporteur on Human Rights and Extreme Poverty, A/HRC/32/31, 28 April 2016, §33.

run by overtly racist and xenophobic governments, practicing discrimination against their own populations under their jurisdiction in the political, economic, cultural, and social spheres, while at the same time exploiting democracy. "Democracy", as promoted globally since the Second World War, has been distorted and is no longer representative. All one needs to do is observe the elections in numerous countries where hundreds of millions, indeed billions, of dollars are necessary to carry on an election campaign, not to mention mass disinformation and manipulation. These expenses are financed largely by transnational corporations (e.g. in the United States). Laws intended to implement economic, social and cultural rights and the public services required to realize them (on labor, trade union freedom, social security, health, education, food, water, the environment, adequate housing etc.) are systematically attacked to such an extent that we now have global companies like Uber that elude their employer obligations. (See the insert in the chapter on the right to work.)

7. Lack of Means and International Cooperation

For States that might have the means, the question is whether they are really sufficiently motivated to implement ESCR. Thus, the CESCR makes "a distinction between inability and lack of political will" in the commitment of States when it comes to honoring their obligations regarding economic, social and cultural rights.[67]

While there must be the necessary means (technical, financial etc.) to implement ESCR such as the right to education or to health, sometimes it is enough for the political authorities not only to not impede, but on the contrary, encourage the citizen actions to produce and "market" their products (peasant and worker cooperatives, housing cooperatives, etc.).[68]

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[67] See, inter alia: CESCR, *General Comment No. 14*, The Right to the Highest Attainable Standard of Health, E/C.12/2000/4, 11 August 2000, §47.

[68] See, inter alia: *Produire de la richesse autrement* (Geneva: CETIM, 2008).

Some States cite a lack of means, rightly or not, to justify the non-implementation of economic, social and cultural rights. Others often cite a passage from Article 2.1 of the ICESCR, which stipulates that the rights enshrined in the Convention are to be assured "progressively", while ignoring the rest of the article. Yet this same article specifies that each State must use "the maximum resources available" to honor its economic, social and cultural rights commitments; the implementation of the rights in question is a collective obligation of all the States parties to the ICESCR, considering that each State must "take steps, individually and through international assistance and cooperation".

International cooperation in good faith is more than ever necessary, not only in the area of health or peacekeeping but also in the area of the implementation of human rights. Regarding this last point, States, by virtue of their international commitments, are duty-bound to protect, to promote and to implement all human rights of all the populations under their jurisdiction, starting with the most vulnerable (children, the elderly, refugees, migrants, persons with disabilities…). They must also refrain from violating the human rights of other populations living under the jurisdiction of other States through such measures as an embargo on food or medicines. Moreover, States with sufficient means must show solidarity with those which, for various reasons (e.g. natural disasters, epidemics, or lack of resources or technical means) are unable to assure the enjoyment of human rights to their populations.

8. Development Model

The economic development model promoted at the global level and currently totally dominant is highly problematic for the realization of ESCR. This model is based on unbridled extraction of non-renewable resources and infinite growth. Contrary to its promoters' affirmations, this model is neither the only way forward nor beneficial for the great majority – on the contrary, it is profitable

only for a tiny minority, leaving billions of persons behind. Worse yet, it threatens life on earth given the exhaustion of natural resources, the mass extinction of species, the threat to food production, widespread pollution (air, soil, water), the climate crisis etc.

This situation demands a rethinking of social organization, economic, trade and fiscal policies and wealth distribution. For this, once more, civil society must play its role as a countervailing power in order to prevent governments from falling into the trap of arbitrary practices and to push them to incorporate participation by the people in the decision-making processes. Civil society must also continue to work for social and environmental justice and the implementation of human rights in general and ESCR in particular, while remaining aloof from all influences, direct or indirect, from government, the private sector and party politics.

PART II

The right of peoples to self-determination has a particular place in human rights norms in that it underpins all these rights: civil, political, economic, social and cultural. In other words, without the right to self-determination, the fulfillment of the other rights is impaired.

The right to non-discrimination is one of the non-derogable principles of these norms, and is cross-cutting across all human rights. Thus, respect for this right is essential in all areas and at all levels.

CHAPTER 1

PEOPLES' RIGHT TO SELF-DETERMINATION

Peoples' right to self-determination is a pillar of contemporary international law. With the adoption of the United Nations Charter in 1945, it constituted the legal and political base of the decolonization that gave rise to more than 60 new States in the second half of the twentieth century. This was a historic conquest, even if it coincided with the desire of certain great powers to force the break-up of the "preserves" of the colonial empires (mostly European) of the time.

Over the decades, dozens of States have been created on this basis, realizing the right to self-determination of peoples, whether officially considered as colonized or not (see below).

In practice, the creation of a new State does not necessarily correspond to objective and legal criteria. In fact, the right to self-determination can be manipulated by certain powers (regional or international) or by powerful private interests. Thus, a new State can be created and recognized by only one State[69] or by a group of States.[70] A State can even be created contrary to the will of the majority of its population, as happened with the creation of Bosnia-Herzegovina.[71] Thus, "the right to self-determination" must be

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69 E.g. Turkey's recognition of the Republic of Northern Cyprus; Russia's recognition of the Republic of Abkhazia and the Republic of South Ossetia, etc.

70 E.g. Kosovo, recognized primarily by the Western powers.

71 Théodore Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: Université d'Aix-Marseille III, Centre d'Etudes et de Recherche Internationales et Communautaires (CERIC), 1999).

handled with great care and, it must be borne in mind, has major political implications.

One must nonetheless add that it is not always easy to have such a unilateral creation recognized, even when it can be justified. To be admitted to the United Nations, the new State must, inter alia, be recognized by other States; the Security Council must recommend it to the General Assembly (without the veto of one of the five permanent members); and the General Assembly must accept the new member by a majority of two thirds of its members.[72]

This begs the following questions: Is the creation of a State the only way for peoples to enjoy the right to self-determination? And is this creation sufficient to guarantee the real exercise of this right?

One cannot but note that the current international system does not prevent the emergence of totalitarian and corrupt regimes, in a world where democratic principles and human rights are not universally promoted or applied with vigor and consistency. Indeed, the international order we sought to create after the Second World War, based on peacekeeping and the recognition of human rights, has not lived up to its promises. On the contrary, these promises have been emptied of their substance by the promotion and implementation of an unjust and unequal economic order that has resulted in the privatization and commodification of almost all areas of life, including defense, which is nonetheless a prerogative of States.

In this context, one cannot overemphasize the responsibility of powerful States, of the international financial and trade bodies and of the transnational corporations (TNCs) for the absence of respect and implementation of the right of peoples to self-determination.

At a time when the pillage of the natural resources of the countries of the Global South has reached unprecedented proportions (with,

[72] https://www.un.org/en/about-us/member-States

for example the grabbing of millions of hectares of land by foreign States and TNCs), it is necessary to revitalize peoples' right to sovereignty over their natural wealth and resources, for it is an essential component of the right to self-determination. This is fundamental to improving the protection of affected peoples and as such is a thread that runs through this chapter.

A. Constitutive Elements of the Right to Self-determination

When one analyses the major United Nations documents (Charter, conventions, and General Assembly declarations and resolutions), it is clear that the enjoyment of the right of peoples to self-determination depends in particular on the following elements: the free choice of both political status and economic, social and cultural development; the sovereign control by people over their natural resources; equality of rights among peoples; non-discrimination; sovereign equality of States; peaceful settlement of disputes; the non-recourse to force; good faith in fulfilling commitments in international relations; international cooperation; and States' observance of their international commitments, especially in the area of human rights.

B. Holders of the Right to Self-determination: People, State, Nation

The holders of the right to self-determination are the peoples. The State is the instrument through which this right is exercised, in the hands of the people(s) that constitute it.

In international instruments, the term "nation" is often used in place of "State" or "people(s)". However, "the United Nations

Charter uses the term 'peoples' a number of times, particularly in its Preamble, as a synonym for 'nations' or 'States'."[73]

The problem is that there is no definition of the notion of "people"[74] recognized at the international level. This perhaps explains why the Committee on the Elimination of Racial Discrimination leaves it up to the "individual concerned" to determine for themselves whether they belong to a particular racial or ethnic group or groups.[75]

The United Nations expert Aureliu Cristescu, on the basis of discussions within the United Nations, suggests the following definition, which could be used to determine whether or not a group constitutes a people qualified to enjoy and exercise the right to self-determination:

> *(a) the term 'people' denotes a social entity possessing a clear identity and its own characteristics;*
> *(b) it implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another;*
> *(c) a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in Article 27 of the International Covenant on Civil and Political Rights.*[76]

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73 *The right to self-determination: historical and current development on the basis of United Nations instruments,* Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1981, § 268.

74 Here, we are essentially referring to the meaning of the term "people" as defined by UN instances.

75 Committee on the Elimination of Racial Discrimination, general recommendation VIII concerning the interpretation and application of article 1, paragraphs 1 and 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1990.

76 Cristescu, op. cit., § 279.

C. Exercise of the Right to Self-Determination

In international law, the legal doctrine holds that there are two aspects of the right to self-determination: external (international) and domestic (national). This distinction is purely formal, for these two aspects cannot exist separately. However, it is obvious that formal political independence does not mean that a people enjoys its right to self-determination.

1. At the International Level

a) Various Forms of the Exercise of the Right to Self-Determination

A people enjoying the right to self-determination at the international (external) level can choose from among several ways of exercising this right, as stipulated in ***The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations***.[77]

> *The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.*

While some peoples have chosen free association (e.g. Switzerland), others have set up a federal State (e.g. Brazil, Germany, Russia,), and yet others have "inherited" the most diverse forms (e.g. centralized State, monarchy).

While it is difficult to draw general conclusions, one can observe that States constituted as federations or confederations offer greater opportunities to their peoples to exercise their right to self-determination. However, being governed by a constitutional monarchy does not mean that the citizens and/or peoples so

[77] Adopted by consensus by the General Assembly in 1970.

governed have fewer opportunities (e.g. the United Kingdom, Belgium).

b) Self-determination of Colonized Peoples

The right to self-determination was enshrined in the United Nations Charter and in the declarations adopted during the 1960s and 1970s (see below) in order to provide a legal base for the self-determination of colonized peoples. In this framework, the exercise of the right to self-determination acquires an external/international dimension, since the aim is to enable the decolonization and independence of colonized peoples.

In its General recommendation XXI on the right to self-determination, the Committee on the Elimination of Racial Discrimination states:

> *The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.*[78]

In the great majority of cases, colonized peoples have chosen independence and have established sovereign States within the former colonial borders. The exercise of their right to self-determination has thus not conflicted with the territorial integrity of other sovereign States. Thus, it was the colonial or occupying powers that had to leave.[79]

However, one must emphasize that the colonial partitions divided numerous peoples. With decolonization, these peoples were split,

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78 *General recommendation XXI on the right to self-determination*, §9, 8 March 1996, A/51/18, pp. 133 and 134.

79 Ioana Cismas, "Secession in Theory and Practice: The Case of Kosovo and Beyond", *Goettingen Journal of International Law*, Vol. 2, No. 2, 2010, pp. 531-587.

straddling the territories of more than one State. The most flagrant example is the configuration of the African continent, where State borders are drawn with geometric precision. It is noteworthy that generally the new States chose deliberately to keep the colonial borders in order to avoid complicating the situation, wanting first and foremost to emphasize the African unity that they were hoping to construct.[80] They were taking a risk, and their bet has still not paid off, as we see from the numerous conflicts deemed "ethnic", whether or not they are fueled from outside.

As the ***International Court of Justice*** confirmed in the ***Western Sahara*** case, one of the most important elements in the exercise of the right to self-determination is "the free and genuine expression of the will of the peoples of the Territory" in question.[81] It had already expressed this opinion in the case of ***Namibia***, occupied at the time by South Africa.[82] In a recent advisory opinion, the Court noted that, as "the decolonization of ***Mauritius*** was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago[83] constitutes a wrongful act entailing the international responsibility of that State."[84]

The break-up of the Ottoman Empire following the First World War continues to affect two peoples in particular: the Kurds and the

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80 Morocco is the exception to the rule on the African continent, thus being isolated within the African Union, for it occupied Western Sahara following the withdrawal of Spanish colonial troops in 1975, triggering a conflict that has continued ever since.

81 International Court of Justice, *Western Sahara*, Advisory Opinion of 16 October 1975, § 162.

82 International Court of Justice, *Namibia*, Advisory Opinion of 21 June 1971.

83 Diego Garcia, part of the Chagos Archipelago, hosts a United States military base on land leased to the United States by the United Kingdom: https://en.wikipedia.org/wiki/Diego_Garcia

84 International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, §177.

Palestinians. The dividing up of the territory of the former among several new States (Iraq, Syria, and Turkey) only increased the oppression and discrimination against the Kurds and is still fueling conflicts, often armed. Regarding the latter, although the United Nations recognized Palestine as non-member observer in 2012,[85] for several decades its territory has been controlled by the occupying power (Israel) and broken up by illegal settlements, which, *de facto*, make self-determination essentially impossible.

c) Self-determination of all peoples

Many international lawyers attempt to prove that the provisions of the two international covenants on human rights[86] do not have a general scope, and that the intention of the drafters of these covenants, in the context of the time, was to give a legal basis to decolonization. Whatever the intention of the drafters, it is clear that the first common article of the two covenants concerns *all* peoples.

However, the best way for any particular people to assert the right to self-determination is not necessarily to set up an independent State. If each of the peoples speaking one of the 6,000 languages identified in the world[87] (if this were the only criterion for identifying a people) were to choose to do this, international relations would no doubt be yet further complicated. Along the same lines, one can wonder about the capacity of several mini-States or of deeply indebted States to participate in decision-making at the international level. Once again, in the absence of a definition of a "people" in international law, the questions that arise are far more of a political than legal order.

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85 General Assembly Resolution A/RES/67/19, 29 November 2012.

86 I.e. the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, 1966.

87 Cf. https://www.unesco.org/en/articles/international-mother-language-day-countries-must-implement-mother-language-based-education-and

The territorial integrity of any given State can be called into question, and the international community's intervention – including armed – can be accepted in two situations: (i) threats to international peace and security; (ii) serious and systematic human rights violations.

i. Threat to International Peace and Security

Threats to international peace and security allow the United Nations Security Council to intervene in the domestic affairs of a given State. However, these notions are often used opportunistically by the great powers (e.g. the cases of Afghanistan, Iraq, Haiti).

ii. Serious and Systematic Human Rights Violations

Many multi-ethnic States do not meet their human rights obligations in general and their obligations regarding the right to self-determination in particular. Thus, it is not uncommon to see the capture of the State apparatus by members of a single "ethnicity", by a clan practicing nepotism or by an oligarchy.

The Vienna Declaration and Program of Action, to some extent, makes the respect of the territorial integrity of a State conditional on the respect of *"the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind"* (Chapter I.2. §3).

In such a context, **secession** becomes legitimate, or indeed a right, and can even be authorized (see below), notwithstanding the risk of manipulation of some situations by the powers of the time.

Although the nightmare of most States might be a questioning of their territorial integrity, and the Charter of the United Nations is very clear in this regard (Art. 2.4), this has not prevented the United Nations member States (51 at the time of its creation, including

several, such as India, that were not formally independent) from co-opting new ones (193 currently, most resulting from decolonization).

As we have already emphasized above, the creation of new States is not necessarily in the interest of the peoples concerned. However, there are situations where peoples are oppressed by their own States and unable to enjoy their right to self-determination. In this case, international law provides for the right to secession.

> *The only hypothesis of recognition of a right of secession envisioned in international law is that of 'remedial secession', i.e. secession responding to a flagrant violation of the right to 'internal' self-determination.*[88]

Bangladesh (originally East Pakistan) is a case in point, having acceded to independence at the end of 1971 on the basis of considerations of, in particular, flagrant and systematic human rights violations. Professor Théodore Christakis places it in the category of "successful" remedial secession, even if this independence was achieved above all owing to the intervention of the Indian army.[89]

In February 2008, Kosovo[90] unilaterally proclaimed its independence, with the support of certain great powers. This proclamation followed NATO's military intervention (1999) and the placing of this province under United Nations administration[91] on the grounds that it was necessary to stop "the violence" against Kosovars of Albanian extraction allegedly committed by the Republic of Serbia and to address the "humanitarian disaster" in the province (the concern of the Security Council). In its ruling of 22 July

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88 T. Christakis, op. cit.

89 Ibid.

90 An autonomous region of the Socialist Republic of Serbia, until 1989 within the Socialist Federal Republic of Yugoslavia, which in 2000 became the Federal Republic of Yugoslavia. With the independence of Montenegro, the Federal Republic of Yugoslavia took the name Serbia. It considers Kosovo one of its provinces.

91 Security Council Resolution 1244, 10 June 1999.

2010, the International Court of Justice concluded that the declaration of independence by Kosovo on 17 February 2008 violated neither general international law nor the Security Council's resolution, nor the constitutional framework.[92] This opinion was shared neither by the Republic of Serbia, which considers Kosovo one of its provinces, nor by many other States (almost half of the United Nations member States).

In this context, the political system of Ethiopia constitutes an interesting example worth mentioning. This country's new constitution (1994) recognized the unilateral right, without restriction, to self-determination of "each nation" that it comprises (nine States and 80 peoples identified).[93] At the time, the president of Ethiopia (subsequently the Federal Democratic Republic of Ethiopia), Meles Zenawi, explained this choice in the following manner. "For 30 years, the government tried to create a homogeneous Ethiopia. It tried to eliminate the differences of language, of culture and so on… What we wish to say is that it is not necessary for us to be homogeneous to be united."[94] Although the armed conflict that broke out in Tigray in November 2020 called into question this position, it does not diminish the quality of the constitution.

2. At the National Level

In the above-mentioned ***Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations***, the General Assembly clarified that, in the framework of the right of peoples to self-determination, all States have the duty to favor universal and effective respect for human rights and fundamental

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92 International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010.

93 T. Christakis, op.cit.

94 Ibid.

freedoms in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights (see also below).

The Universal Declaration of Human Rights (Art. 21) and the International Covenant on Civil and Political Rights (Art. 25) enshrine the right of all to participate in public affairs.

In the view of the CERD:

> *The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, … In consequence, governments are to represent the whole population without distinction as to race, color, descent, national or ethnic origin.*[95]

Given these considerations, all the peoples present on a State's territory must be allowed effective participation in public affairs, both national and international (e.g. negotiations on trade treaties).

Taking into account that less than 10% of the world's States are really "homogeneous",[96] the task is arduous. However, the solution is to be found in the effective implementation of human rights everywhere in the world – understood as both individual and collective rights – at the national and international level, as well as the State's respect of its obligations pursuant to the instruments discussed in this chapter.

3. Self-determination of Indigenous Peoples

Until 2007, the international instrument offering specific protection to the rights of indigenous peoples was ***ILO Convention 107*** (1957), then the ***ILO Indigenous and Tribal Peoples Convention***

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[95] General recommendation No. 21 on the right to self-determination, 8 March 1996, § 4.

[96] T. Christakis, op. cit.

No. 169 (1989). The latter is important because it protects several fundamental rights of indigenous peoples. In particular, Articles 13 to 17 enshrine the rights of indigenous peoples to their lands and territories as well as the right to participate in the use, management and conservation of their resources. The articles further enshrine the rights of indigenous peoples to consultation prior to any use of resources situated on their lands and the prohibition on displacing them from their lands and territories.

The General Assembly's adoption of the ***United Nations Declaration on the Rights of Indigenous Peoples*** in September 2007 enabled a reinforcement of the protection of the rights of indigenous peoples, going beyond the ILO Conventions.[97] The Declaration recognizes the right of indigenous peoples to fully enjoy – collectively or individually – all the human rights and fundamental freedoms recognized in international human rights law. It goes yet further in recognizing the right of indigenous peoples to self-determination and to their land and resources. The Declaration lists the injustices committed during colonization and acknowledges the threats underlying globalization. It protects traditional knowledge, biodiversity and genetic resources and imposes limits on activities that third parties may carry out on indigenous lands.

While Article 3 of the Declaration enshrines the right of indigenous peoples to self-determination,[98] it does not define "indigenous peoples". Article 4 mentions only autonomy within the framework of the States within which the indigenous peoples live.[99]

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97 Report of the Special Rapporteur on the Right to Food, A/61/306, 1 September 2006, §§ 41-44.

98 "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

99 "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

Further, many indigenous people are not recognized as such by the States within which they live and are thus unable to assert their rights.

The fact that the right to self-determination inheres simultaneously in both indigenous peoples and the States within which they live creates a potential for conflict, especially if there is no dialogue concerning the divergent interests of the various actors and no respect of fundamental human rights and democratic principles. As a positive example, one might note the new constitutions adopted by Venezuela (1999), Ecuador (2008) and Bolivia (2009), according broad autonomy to indigenous peoples - though the implementation of these constitutions depends on the governments in power, as demonstrated by the many uprisings of indigenous peoples in Ecuador in recent years.

4. Self-determination of Minorities

Although indigenous peoples have the right to self-determination and the right to their lands and resources, this is not the case for ethnic, religious and linguistic minorities, though their right to enjoy their own culture, to profess and practice their own religion and to use their own language is enshrined in Article 27 of the ***International Covenant on Civil and Political Rights*** (see below). The rights of minorities must not be confused with the right of self-determination of peoples. Moreover, Article 8.4 of the ***Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*** excludes any interpretation in this sense.[100]

Nonetheless, confusion reigns in this area given that there is no accepted definition of minorities at the international level. Thus, the practices of States vary. Some deny outright the status of minorities as entities constituting peoples within their nation. Yet, as the

[100] "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States."

Human Right Committee notes, States that claim "that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities".[101]

Thus, depending on the interpretation, the rights of minorities can concern both indigenous peoples and migrant workers. The Human Rights Committee goes yet further in its interpretation of minority rights, stating that "they [persons belonging to minorities] need not be nationals or citizens, they need not be permanent residents."[102]

D. Permanent Sovereignty of Peoples over their Natural Resources

Political independence cannot be dissociated from economic sovereignty. One can even say that, without economic independence, political sovereignty is bound to remain theoretical, as Julius Nyerere, the former president of Tanzania, declared with eloquence in 1979:

> *Each of our economies [of the States constituting the G77] has developed as a by-product and a subsidiary of development in the industrialized North, and is externally oriented. We were not the prime movers of our own destiny. We are ashamed to admit it, but economically, we are dependencies – semi-colonies at best – not sovereign States.*[103]

In our times, the situation of most African States has hardly changed, given the heavy legacy of colonialism and imperialism as the great powers continue to control the natural resources of the continent. Yet this is a crucial matter, which several Latin American

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101 Human Rights Committee, General Comment No. 23, The Rights of Minorities (1994), § 4.

102 Ibid., § 5.2.

103 "Unity for a New World Order 1979", opening speech at the fourth ministerial G77 conference in Arusha, Tanzania, 12 February 1979, published in *Le dialogue inégal: Ecueils du nouvel ordre économique international,* (Geneva: CETIM, 1979).

States have tackled in the recent past. As examples, one might mention the Bolivia of Evo Morales, the Ecuador of Rafael Correa and the Venezuela of Hugo Chavez, who nationalized or renegotiated their contracts with foreign petroleum companies. The profits thus produced were invested for the most part to satisfy the economic, social and cultural rights of the people concerned (food, adequate housing, education, health etc.). On the European continent, in 2005, the government of the Russian Federation acquired the Yukos oil trust, a move which assured the State monopoly of Gazprom (the semi-public gas trust until then) and consequently the State's control of the country's energy resources.

While this sort of action is rare in the neoliberal world, there is nothing revolutionary about it. In fact, the International Court of Justice had already recognized in 1952 the legality of the nationalization of the Anglo-Iranian Oil Company by Iran. In its judgment of 22 July 1952, the Court rejected the arguments of the United Kingdom against nationalization.[104]

In its decision adopted in May 2009, the African Commission on Human and Peoples' Rights attributed to one of the indigenous peoples of Kenya (the Endorois) the right to freely dispose of their wealth and natural resources, as enshrined in the African Charter on Human and Peoples' Rights, ruling that the Endorois were entitled to recover their traditional lands and territories, which the Kenyan government intended to develop for tourism.[105]

The United Nations bodies, the General Assembly in particular but also UNCTAD and the Security Council, have repeatedly reaffirmed this right. Since 1952, the General Assembly has adopted a series of texts (resolutions, declarations, charter, conventions etc.)

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104 International Court of Justice, Anglo-Iranian Oil Co., 22 July 1952.

105 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, communication number 276/2003, decision rendered in May 2009.

devoted to the economic aspect of self-determination.[106] Among these texts, Article 1 common to the two human rights Covenants, constitutes a particular reference. Accordingly, people have not only the right to *"freely pursue their economic, social and cultural development"*, but also to "freely dispose of their natural wealth and resources." Additionally, "*in no case may a people be deprived of its own means of subsistence"¨ (emphasis added)*

The ***ICESCR*** clarifies this yet further in its Article 25:

> *Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.*

The permanent sovereignty of peoples over their natural resources has been affirmed repeatedly in other United Nations instruments, which complete the recognition of the right to self-determination by giving it a more specific content. Among these instruments (see also section E below, Pertinent International and Regional Norms), one might mention the following.

In its resolution regarding ***permanent sovereignty over natural resources***,[107] *"considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,"* the General Assembly proclaimed that *"the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."*

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106 General Assembly Resolution 523 (VI), 12 January 1952; the first resolution on this subject.

107 General Assembly resolution 1803 (XVII), 14 December 1962, preamble & § 1.

The ***Declaration on the Establishment of a New International Economic Order***[108] emphasizes, among other things:

> *The new international economic order should be founded on full respect of the following principles: … e) full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.*

The ***Charter of Economic Rights and Duties of States***[109] proclaims that:

> *Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.*

The Principles of the ***United Nations Conference on Trade and Development*** (UNCTAD) regarding the management of international trade relations and trade policies favoring development stipulate, inter alia, that:

> *Every country has the sovereign right freely to dispose of its natural resources in the interest of the economic development and well-being of its own people; any external, political or economic measures or pressure brought to bear on the exercise of this right is a flagrant violation of the principles of self-determination of peoples and non-intervention, as set*

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[108] General Assembly Resolution 3201 (S-VI), 1 May 1974.

[109] General Assembly Resolution 3281 (XXIX), 12 December 1974, Chapter II, Art. 2, § 1.

forth in the Charter of the United Nations and, if pursued, could constitute a threat to international peace and security.[110]"

The ***Security Council***, for its part, in Resolution 330 (1973) of 21 March 1973 on peace and security in Latin America, affirmed the principle of peoples' permanent sovereignty over their wealth and natural resources. In the same resolution, it urged States "to adopt appropriate measures to impede the activities of those enterprises which deliberately attempt to coerce Latin American countries".

E. Pertinent International and Regional Norms

The right of peoples to self-determination and to sovereignty over their wealth and natural resources has been enshrined in a significant number of international and regional instruments.

1. At the International Level

The right to self-determination has a central place in the Charter of the United Nations and the two international human rights covenants. This right is also enshrined in numerous United Nations declarations and resolutions.

The ***Charter*** begins "We, the peoples of the United Nations" and in its first article, which proclaims the purposes of the United Nations, sets forth the objective "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

In Article 55, the Charter recalls the same objective, providing that the United Nations should promote economic and social development, international cooperation and universal respect for human rights

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[110] UNCTAD Resolution 46 (III), "Steps to achieve a greater measure of agreement on principles governing international trade relations and trade policies conducive to development", 18 May 1972.

"with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

The ***Declaration on the Granting of Independence to Colonial Countries and Peoples***[111] constitutes the first significant United Nations contribution to the definition of the right to self-determination.[112] It was adopted by the member States,

believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith.[113]

In the Declaration, States recognized that "all peoples have the right to self-determination" (Art. 2), and solemnly proclaimed:

> *The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. (Art.1)*

This declaration provided a legal and political foundation to the movements of national liberation that led to the wave of decolonization that began in the 1960s.

With the adoption of the two Covenants and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, this right was extended to all peoples, colonized or not.

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111 General Assembly Resolution 1514 (XV) 14 December 1960, Art 1.

112 Daniel Thürer & Thomas Burri, Self-Determination (Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2010), § 9.

113 Preamble to the Declaration on the Granting of Independence to Colonial Countries and Peoples.

The two covenants – the ***ICESCR*** and the ***International Covenant on Civil and Political Rights*** – enshrine in the same terms the right of peoples to self-determination. In particular, according to Article 1 common to both covenants:

> *1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
> *2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
> *3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

It should be emphasized that the signatory States of these two covenants commit themselves to implementing the rights enshrined therein for everyone under their jurisdiction without distinction or discrimination (on grounds in particular of sex, language, religion, political opinion, ethnic origin or social status).

One might further note that the Human Rights Committee often uses Article 27 of the International Covenant on Civil and Political Rights to clarify the rights of minorities over their lands and natural resources. (See the cases of Finland and Peru below.)

The ***Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*** enshrines the right of all peoples "freely to determine, without external interference, their

political status and to pursue their economic, social and cultural development".[114]

In the Declaration, the United Nations has defined "subjecting peoples to subjugation, to domination or to foreign exploitation" as constituting violations of the right to self-determination, contrary to its Charter. Further, it has proclaimed:

> *States shall conduct their international relations in the economic, social, cultural, technical and trade fields in accordance with the principles of sovereign equality and non-intervention.*

Also by virtue of this Declaration, States have the obligation to promote the right of self-determination of peoples. This is important, but it can be variously interpreted, depending on the actors, as already mentioned.

Adopted one year earlier, the ***Declaration on Social Progress and Development***[115] considers the "permanent sovereignty of each nation over its natural wealth and resources" to be one of the essential conditions in this area (Art. 3).

The **Declaration on the Right to Development** establishes clear links between the right of self-determination of peoples and their right to freely dispose of their wealth and natural resources. Articles 1 and 5 are the most explicit.

Article 1:

> *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. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which*

[114] General Assembly Resolution 2625 (XXV), 24 October 1970.

[115] General Assembly Resolution 2542 (XXIV), 11 December 1969.

includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 5:

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid , all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

The Declaration on the Right to Development also insists on the right and the duty of each State

to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom" (Article 2 §3).

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** is also pertinent in this regard. It enshrines for peasants and other persons working in rural areas "the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions" (Art. 5.1). It also enshrines

the right to have access to, sustainably use and manage land and the water bodies, coastal seas, fisheries, pastures and forests therein, to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures. (Art. 17.1)

This Declaration specifies that peasants and others working in rural areas are entitled to "equal access to, use of and management of land and natural resources, and to equal or priority treatment in land and agrarian reform and in land resettlement schemes" (Art. 4.2.h). The Declaration prohibits any "arbitrary and unlawful forced eviction, the destruction of agricultural areas and the confiscation or expropriation of land and other natural resources, including as a punitive measure or as a means or method of war" (Art. 17.4). It requires States to recognize and protect "the natural commons and their related systems of collective use and management" (Art 17.3).

Further, one should point out that Article I.2 of the 1993 ***Vienna Declaration and Program of Action***,[116] stipulates that:

> *All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.*
> *Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.*
> *In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-*

[116] Adopted in June 1993 in Vienna at the conclusion of the second World Conference on Human Rights.

determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

One should emphasize that the last two paragraphs, which contradict each other at least to some extent, present all the complexity of the question and demonstrate that it pertains more to politics and power dynamics than to law.

In view of the above, we can state, along with the United Nations expert Aureliu Cristescu, that the right to self-determination is enshrined as a basic human right in international law.

As a basic human right, the recognition of the right of peoples to self-determination is tied to the recognition of the human dignity of peoples, for there is a link between the principle of equality of rights and of self-determination of peoples and respect of basic human rights and justice. The principle of self-determination is the natural corollary of the principle of individual freedom, and the subjugation of peoples to a foreign domination constitutes a denial of basic human rights.[117]

2. At the Regional Level

The ***African Charter on Human and Peoples' Rights*** is the treaty that most explicitly recognizes the right of peoples to self-determination and to full and free access to their wealth and natural resources. No less than five articles are devoted to it.

In Article 19, the African Charter proclaims: "All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

Article 20 of the African Charter enshrines the African peoples' right to self-determination as follows.

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[117] Aureliu Cristescu, op.cit., § 221.

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

In Article 21, The African Charter recognizes in detail the right of African peoples to freely dispose of their wealth and natural resources, as follows.

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.
4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

In the following articles, the African Charter enshrines the right of the African peoples to economic, social and cultural development and to equal enjoyment of their common heritage (Art. 22), their

right to peace and security (Art. 23) and their right to "a general satisfactory environment favourable to their development" (Art. 24).

Adopted on 1 August 1975, the ***Final Act of Helsinki*** constitutes the founding text of the Organization for Security and Co-operation in Europe (OSCE), which enabled the rapprochement between the countries of East and West Europe. While ten chapters deal essentially with relations among the signatories (in particular the sovereignty and territorial integrity of these States), Chapter VIII of its Declaration on Principles Guiding Relations between Participating States is devoted to the right of self-determination in a highly progressive way:

> *The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.*
> *By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development (emphasis added).*
> *The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.*

The ***Charter of the Organization of American States*** affirms in the third article of Part 1:

> *b) international order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;*

e) every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems.

F. Specific Obligations of States regarding the Right to Self-Determination

As just discussed, the right to self-determination and to permanent sovereignty over natural resources is a basic right recognized in numerous international and regional instruments, but it is rarely fully respected in practice and in all its dimensions. While most States have not included it explicitly in their national legislation, the vast majority of them have ratified the two international covenants on human rights, and all United Nations member States have committed themselves to honoring the United Nations Charter. In this regard, they are obliged to respect, protect and implement the right to self-determination and to free disposal of peoples' natural resources.

International law provides for States' obligations in respect of peoples' right to self-determination. These are both negative and positive.

First, all States have the duty to respect the right to self-determination in conformity with the United Nations Charter. Second, all States have the duty to favor the realization of the right of peoples to self-determination and to help the United Nations fulfill its responsibilities in the implementation of this principle, in order to:

- favor friendly relations and cooperation among States;

- rapidly end colonialism by duly taking into account the freely expressed will of the peoples in question.[118]

The right to freely dispose of wealth and natural resources also imposes obligations on States. As provided for in the 1962 resolution on permanent sovereignty over natural resources, this right must always "*be exercised in the interest of national development and the well-being of the population of the State*." The most important obligation is thus to use wealth and natural resources to improve the well-being of the overall population of any given State and of each of its constituent elements, taking into account that the interests of the various parties may be divergent.

In accordance with the two international human rights covenants, the right to freely dispose of wealth and natural resources must be exercised for the purpose of favoring and allowing the realization of the other human rights enshrined in the conventions. Thus, by using its wealth and natural resources, a State must ensure the *respect, protection and fulfillment* of all the components of human rights. In many cases, this implies simply *respecting* traditional usage of wealth and natural resources by the local population. In other cases, it necessitates *protecting* the local population from powerful third parties, such as transnational corporations, which pillage and/or destroy wealth and natural resources. States must take measures and create the necessary conditions, using the resources at their disposal (natural, financial, technical etc.), to improve the well-being of their population(s) (*fulfillment*). The use of these resources must be decided on with the participation of the people, respecting human and environmental rights.

1. Obligations of Third-Party States

In the event of human rights violations in a given country, accusations are very often leveled against the State in question,

[118] General Assembly Resolution 2625 (XXV), 24 October 1970.

sometimes against a transnational corporation but rarely against dominant third-party States. Nonetheless, the exercise of the right to self-determination and to free disposition of wealth and natural resources comports a major international component. In the ICESCR, States have committed themselves to cooperating, with a view to ensuring the full exercise of the rights enshrined in the ICESCR and have proclaimed that, "in no case may a people be deprived of its own means of subsistence" (Art. 1.2). Consequently, third-party States have the obligation to *respect* the right to free disposal of wealth and natural resources, particularly by refraining from taking measures that would deprive a people of its means of subsistence. They also have the obligation to *favor* the exercise of this right in other States, particularly through international cooperation and assistance. In this regard, States are obliged to act in solidarity with a State that lacks the means to honor its commitments regarding economic, social and cultural rights. (See also Part I, Chapter 1.D).

Obligations of third-party States can translate into the obligation, inter alia, to respect the development model adopted by a given people/State; to refrain from imposing trade treaties undermining human rights; to refrain from encouraging activities of TNCs that are harmful to the environment and to the exercise of human rights; etc.

2. Obligations of Other Entities

By "other entities", we mean those commonly called "non-State actors" that have a major – indeed, decisive – influence on the exercise of the right to self-determination. Among these are international financial and trade institutions (e.g. the IMF, the World Bank, the World Trade Organization) as well as TNCs. Although the first two are intergovernmental institutions required to respect the United Nations Charter and the international human rights instruments, including those dealing with the right to self-determination, they more often than not defend private sector interests by favoring TNCs control of all economic activity, which

indisputably undermines the sovereignty of many States. In various areas, both the international financial and trade institutions and the TNCs ignore their human rights obligations,[119] and many of their activities entail violations of the right to self-determination.

G. Examples of Implementation

If a State does not fulfill one of its obligations relative to the right to self-determination and to free disposal of wealth and natural resources (for example by impeding the local or national population's access to food and/or water by exploiting them, or by using only a tiny portion of the revenues derived from such exploitation to improve the well-being of the population), the persons and peoples victims of such violations should have access to oversight mechanisms to demand their rights. All victims have the right to adequate reparation or compensation and a guarantee of non-repetition.

In fact, the possibilities of gaining access to justice in the event of violations of the right to self-determination and free disposal of natural resources, and the chances of obtaining reparation or compensation depend broadly not only on the availability of information about the oversight mechanisms at the national, regional and international levels, but also on prevailing power dynamics and national or international endeavors, bearing in mind that, in this highly politicized area, we are not immune from manipulation.

1. At the National Level

At this level, the main oversight mechanism in the event of human rights violations is to be found in the judiciary: primarily the courts. In the great majority of cases, there are procedures of redress in local and national courts (right up to the Supreme Court or the Constitutional Court).

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[119] Melik Özden, *Transnational Corporations' Impunity* (Geneva: CETIM, 2016).

The right of self-determination and of free disposal of wealth and natural resources is rarely invoked in court at the national level and, when it is, it is usually the rights of indigenous peoples over their natural resources that are invoked, on the basis of ILO Convention 169. Such was the case, for example, in ***Argentina***, where indigenous peoples, who had not been consulted before the attribution of concessions to TNCs on their territories, won their case.[120]

In most States, the governments that do not respect their obligations regarding the right to self-determination and to free disposal of wealth and natural resources can be judged only on the basis of other rights enshrined in the constitution. This is the case in India, where the right to life can be invoked, and in South Africa, where economic, social and cultural rights can be invoked.

Among the States that enshrine the right to life in their constitution, it is indisputably ***India*** that offers the best example of the involvement of courts in the protection of local populations' rights to their own resources. For example, to protect the right to life, interpreted as the right to live in dignity, the Indian Supreme Court upheld the rights of traditional fishers to access to the sea and the rights of local farmers to land and water in opposition to the activities of shrimp industry.[121] It also protected the rights of tribal populations to their natural resources against mining concessions granted by the State to private mining companies.[122] That said, in many other cases (the Bhopal disaster, the Narmada dam and trade treaties, inter alia), the Indian judiciary was not able to prevent major violations.

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120 Christian Courtis, "Socio-Economic Rights before the Courts in Argentina," in Fons Coomans, ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia, Maastricht Center for Human Rights, 2006), pp. 309-353.

121 Supreme Court of India, S. Jagannath Vs. Union of India and Ors, 1996.

122 Supreme Court of India, Samatha Vs. State of Andhra Pradesh and Ors, 1997.

Regarding ***South Africa***, on 1 September 2022, the High Court of Justice of Eastern Cape annulled the decision of the Ministry of Energy to renew a concession to Shell. The exploration of pockets of hydrocarbons was declared to have been carried out using the technique of seismic waves, consisting of provoking undersea explosions with compressed air every ten seconds without interruption for at least five months. The Court noted that the exploration permit had been renewed without consultation of the affected communities (local fishers and other coastal communities) and that the Ministry had failed to take into consideration their right to a livelihood as well their cultural and spiritual rights plus the potential damage to the environment and to marine and coastal life.[123] The High Court also took into account the role of the ocean as a sacred site for the coastal communities, who consider themselves as having duties and obligations to the sea, the earth and the forests as well as to present and future generations and to their ancestors, who live in the ocean.[124]

2. At the Regional Level

In 1996, the ***African Commission on Human and People's Rights*** heard arguments concerning rights over the natural resources of the Ogoni people (***Nigeria***) who were opposing the activities of a consortium set up by the national oil company and the transnational company Shell. By taking part in the production of the oil, the Nigerian government was accused of having destroyed the resources of the Ogoni people, in particular by participating in the poisoning of the soil and water that the Ogoni depended on for agriculture and fishing. The Nigerian security forces also were accused of having

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123 Sustaining the Wild Coast NPC and Others v. Minister of Mineral Resources and Energy and Others, 3491/2021 [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk) (1 September 2022), §107, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220901_Case-No.-34912021_judgment.pdf [s]

124 Ibid., §115.

spread terror by attacking the villages and of destroying the crops, thus creating a climate of insecurity making impossible the villagers' return to their fields and their cattle, which had brought on malnutrition and even famine within some of the Ogoni communities. In its ruling, the African Commission concluded that the government of Nigeria had violated its obligation to *protect* the Ogoni people's rights over natural resources against the activity of national and transnational oil companies.[125] To provide redress to the violations of which the Ogoni had been victims, the African Commission asked the Nigerian government to take concrete measures, including paying compensation and cleaning up the polluted and damaged lands and rivers.[126] It also asked that an adequate evaluation of the social and environmental impact of the oil company operations be carried out for all future development projects and pointed out that the government must provide information on the risks to health and to the environment as well as effective access to the regulatory and decision-making bodies by the communities likely to be affected by oil operations.[127] Nonetheless, several years after this ruling, the living conditions of the Ogoni communities had not improved significantly.[128]

The ***African Court of Human and Peoples' Rights*** ruled for the first time since its creation on violations of indigenous peoples' rights, in a case concerning forced expulsions of the Ogieks, an indigenous ethnic minority in ***Kenya***, living in the Mau Forest, their ancestral land. An umpteenth expulsion notice had been issued by the Kenyan Forest Service in October 2009. Organizations

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125 African Commission on Human and Peoples' Rights, SERAC, Center for Economic and Social Rights v. Nigeria, 2001, §§ 65-66.

126 Ibid, § 49.

127 Ibid, conclusive part, § 1.

128 UN Commission on Human Rights, *Report of the African Commission on Human and Peoples' Rights on Indigenous Populations/Communities*, E/CN.4/Sub.2/AC.5/2005/WP.3, 21 April 2005, pp. 19-20.

representing 35,000 Ogieks[129] notified the African Commission, which took interim measures requesting that the Kenyan government suspend this expulsion notice. In the absence of a government response, the Commission transferred the case to the Court in 2012.

The Court acknowledged on 26 May 2017 that the Kenyan government had deprived the Ogieks of seven of their rights including the right to freely dispose of their wealth and natural resources, enshrined in Article 21 of the Charter.[130] More recently, in June 2022 the Court ruled on reparation measures and ordered Kenya to pay 157,850,000 Kenyan shillings for material and moral damages suffered by the Ogiek. It also ordered the State to grant collective title to these lands in order to guarantee their use and enjoyment by providing judicial certainty.[131] Concerning the concessions and leases granted on the ancestral lands of the Ogiek, the Court also required that Kenya undertake "dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the

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129 Ogiek Peoples' Development Program, Center for Minority Rights Development and Minority Rights Group International.

130 African Court of Human and Peoples' Rights, African Commission on Human and Peoples' Rights v Republic of. Kenya, Application No. 006/2012, 26 May 2017, §§ 200, 201, https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/b4c/5f55feb4cb45d164357125.pdf

131 Ruling (reparation) of the African Court of Human and Peoples' Rights, 23 June 2022, concerning the case of the *African Commission on Human and Peoples' Rights v Republic of. Kenya, Application No. 006/2012*, § 160; https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babafd8d467689318212.pdf

concerned third parties and return such land to the Ogiek."[132] Moreover, the Court provided that, "in the event that it should prove impossible to arrive at a compromise, the State should indemnify the third parties concerned and return the lands to the Ogiek."[133]

In the 1985 *Yanomami v. Brazil* case, the ***Inter-American Commission on Human Rights*** for the first time sanctioned a violation of collective rights. The petition filed in the name of the Yanomami community sought protection of the rights of its members (more than 10,000 persons living in the Amazon region) violated by the construction of a highway and by mining activities on the community's territory. Thousands of indigenous people had been forced to flee and hundreds had died of disease. A government agricultural development project intended to provide food to the displaced persons turned out to be ineffective. The government of ***Brazil*** had also committed to demarcating the lands of the community, but the plan was not implemented.[134] In its ruling, the Inter-American Commission concluded that Brazil had violated several rights enshrined on the American continent, and it recommended that the government take concrete measures to demarcate the community's territory and implement social and medical assistance programs.[135] In 1992, the community's territory was demarcated, and in 1995 the Inter-American Commission carried out a field visit to verify that it was properly respected and protected.[136] When representatives of this and other communities of the region filed another complaint, the Commission adopted, on 17 July 2020, precautionary measures regarding some 20,000 illegal gold miners who had invaded the lands of the Yanomami, the Ye'Kwana

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132 Ibid.

133 Ibid.

134 Resolution No. 12/85, Case No. 7615, Brazil, 5 March 1985, §§ 2, 3.

135 Ibid., conclusive part, § 2.

136 Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Brazil, 29 September 1997, §§ 63-73.

and the Munduruku, pillaging their resources, contaminating their land and waterways with mercury, transmitting sicknesses, committing assaults, rapes and murders.[137] On 18 May 2022, the Commission requested the Inter-American Court to take precautionary measures and asked the Brazilian government to take all necessary steps to protect the indigenous peoples' right to life, to physical integrity and to health, and to implement measures to prevent threats and acts of violence against them as well as illegal and polluting activities.[138]

In 2007, the Kaliña and Lokono peoples applied to the Inter-American Commission regarding violations by ***Suriname*** of their right to dispose over their ancestral territory. The State had fragmented these peoples' territories by creating natural reserves and had granted land titles to third parties, authorizing the exploitation of a bauxite mine. The case was referred to the Inter-American Court, which noted in particular a violation of these peoples' right to collective property in its 2015 ruling. It thereupon requested that Suriname recognize the legal collective personality of the Kaliña and Lokono peoples; that it delineate and demarcate their territory and furnish them with collective title deeds, to assure them of the enjoyment of their territorial rights *(derechos territoriales)*; that it create a development fund; and that it rehabilitate the areas affected by the mining activities (decontamination and reforestation within three years).[139]

In the *Mayagna (Sumo) Awas Tingni Community v.* ***Nicaragua*** case, the ***Inter-American Court of Human Rights*** protected the access of

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137 *Resolution 35/2020, Precautionary Measure No. 563-20, Members of the Yanomami and Ye'kwana Indigenous Peoples regarding Brazil*, 17 July 2020; https://www.oas.org/en/iachr/decisions/pdf/2020/res_35-20_mc_563-20_br_en.pdf

138 https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/107.asp

139 *Caso pueblos Kaliña y Lokono vs. Surinam*, Judgment of 25 November 2015 (Fondo, Reparaciones y Costas), §§ 288-291, 329.

some one hundred families from the indigenous Awas Tingni community to their ancestral land, which was threatened by a concession granted to a South Korean company. The Court ruled in 2001 that the State had violated its obligation to refrain from all activities, direct (through its agents) and indirect (accepting or tolerating activities by a third party), that might affect the existence, the value, the use or the enjoyment of the lands on which the members of the community lived and carried on their activities.[140] To remedy the situation and as compensation for immaterial damages, the Court ordered Nicaragua to invest US$ 50,000, to be spent in agreement with the members of the community on public works and collective services of benefit to the community overall, under the supervision of the Inter-American Commission on Human Rights.[141] It also provided that the State should take measures to delineate, demarcate and recognize the established property titles to the lands of these communities, with their full participation and in agreement with their values and their customary rights.[142] In follow-up to the judgment, the Court noted in 2009 that Nicaragua had fully complied with the 2001 ruling by delineating and recognizing the property titles to the lands of the member of Mayagna (Sumo) Awas Tingni communities.[143]

In the *Sawhoyamaxa v.* ***Paraguay*** case, the Inter-American Court protected the right to life of members of the indigenous Sawhoyamaxa community.[144] The community's members were living in deplorable conditions owing to the lack of access to their

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140 Inter-American Court of Human Rights, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001, §§ 153, 164, 173.4.

141 Ibid., §§ 167, 173.6.

142 Ibid., §§ 138, 164, 173.3.

143 Order of the Inter-American Court of Human Rights, 3 April 2009, Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Monitoring Compliance with Judgment).

144 Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, 2006.

traditional means of subsistence, in particular land, and 31 of them had died from 1991 to 2003 from sickness due to the conditions in which they had been living.[145] In its 29 March 2006 ruling, the Court invoked the progressive interpretation of the right to life that it had already given in its previous jurisprudence. It then pointed out that the primary measure that the government should have taken to protect the right to life of the community's members was to recognize their rights to their ancestral lands.[146] In its conclusions, the Inter-American Court recommended substantial reparations for the community as a whole and for its individual members. Acknowledging that all the latter were individually victims, the Court determined that the compensation awarded to the community should be put at the disposal of the leaders, in their capacity of representatives. To compensate for the violations, it determined that, within three years, the State must take the necessary legislative and administrative measures so that the members of the community may enjoy, formally and physically, the benefit of the ancestral lands. It also judged that the State must create a development fund for the community, in the amount of one million United States dollars, to implement projects in agriculture, sanitation, drinking water, education and housing.[147] In follow-up to its ruling, the Court recognized in 2019 that Paraguay had fulfilled some of its obligations such as putting in place a registration and documentation program so that the members of the Sawhoyamaxa community might obtain identity documents. However, the formal handing over of the traditional territory to the indigenous Sawhoyamaxa community, the creation of a development fund, the compensation for non-material damage, the supplying of goods and services necessary for the

145 Ibid., §§ 3, 145.
146 Ibid., § 164.
147 Ibid., §§ 204-230.

survival of the members of the community while they are without access to their lands, have still not been effectively carried out.[148]

3. At the International Level

For now, there is only one international judicial oversight mechanism for the protection of the right to self-determination and the free use of wealth and natural resources: the International Court of Justice. The other oversight mechanisms available are quasi-judicial or extrajudicial. Applications can be made to the ILO oversight bodies entrusted with monitoring the implementation of ILO conventions, which include Conventions No. 107 and No. 169 on indigenous and tribal peoples, to seek protection for the right to self-determination of indigenous peoples. (See part II, Chapter 1)

Article 38 of the Statute of the ***International Court of Justice (ICJ)*** specifies the sources of international law that the ICJ must apply. Among these sources figure the treaties ratified by States. Potentially, all the treaties enshrining the right to self-determination and to free disposal of wealth and natural resources and to which the States parties to litigation are party can thus be invoked before the ICJ, insofar as these States have recognized the Court's jurisdiction. In the examples of ***Western Sahara***, ***Namibia***, ***Kosovo*** and ***Mauritius***, the ICJ has ruled on several occasions on the rights of peoples – colonized or not – to self-determination. It has also dealt with threats to inter-State sovereignty. In this regard, the Court found against the United States for having threatened the sovereignty of ***Nicaragua***. In a judgment of the International Court of Justice of 27 June 1986 *concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America), the Court declared, inter alia, that the "United States of America, by training, arming, equipping, financing and supplying the *contra*

[148] Inter-American Court of Human Rights, judgment of 14 May 2019, *caso Comunidad Indígena Sawhoyamaxa vs. Paraguay, Supervisión de cumplimiento de sentencia* (Sentence enforcement and monitoring).

forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State; […] not to use force against another State; […] not to violate the sovereignty of another State."[149]

The ILO has on many occasions adjudicated questions regarding indigenous peoples' right to self-determination. For example, India's *Recognition of Forest Rights Act*, 2006 recognizes the rights of tribal communities and other traditional inhabitants of the forest to the resources on which these communities depend, especially regarding subsistence, habitat and other sociocultural needs. However, on 13 February 2019, the Indian Supreme Court, in the case *Wildlife First v Ministry of Environment and Forest*, ordered the governments of 21 Indian s to expel persons who had not been recognized under the *Forest Rights Act*, in other words, having no forest rights. The Court suspended its eviction ruling several days later (28 February 2019) owing to the lack of information supplied by the governments concerned. The ILO ***Committee of Experts on the Application of Conventions and Recommendations*** noted in this case that some 9 million inhabitants of forests would be threatened with eviction. It recalled ***India's*** obligations under Articles 12.2 12.3 of ILO Convention No. 107: *"the peoples concerned shall not be removed from their territories without their free consent and that, if relocation takes place, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development, or, if they express preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees."*[150]

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149 Judgment of the International Court of Justice of 27 June 1986 concerning military and paramilitary activities in and against Nicaragua.

150 Protection des Dongria Kondh, https://www.ilo.org/dyn/normlex/fr/f?p=1000:13100:0::NO::P13100_COMMENT_ID,P13100_LANG_CODE:4049340,en:

The United Nations human rights mechanisms have also dealt with these questions. In its concluding observations addressed to ***Guatemala*** in 2003, the ***CESCR*** emphasized, inter alia, the discrimination to which indigenous peoples are subjected in access to land, the failure to implement agrarian reform in order to rectify the situation, and the low tax rates that hindered the realization of the population's economic, social and cultural rights.[151] Some 20 years later, the CESCR remained concerned that not only did discrimination against indigenous peoples at all levels continue, but activities of "economic development" by the private sector "cause irreparable harms to the environment and undermine the right to health and a decent standard of living of the affected communities".[152]

In its concluding observations for ***Madagascar***, in 2009, the CESCR expressed its concern regarding the adoption of a new law allowing foreign businesses to acquire huge tracts of land to the detriment of the rights of the local peasant communities to freely dispose of their natural resources, enshrined in Article 1 of the Covenant. The Committee is *"concerned that Law No. 2007-036 of 14 January 2008, relating to investment law which allows land acquisition by foreign investors, including for agricultural purposes, has an adverse impact on the access of peasants and people living in rural areas to cultivable lands, as well as to their natural resources. The Committee is also concerned that such land acquisition leads to a negative impact on the realization by the Malagasy population of the right to food. (art. 1) The Committee recommends that the State party revise Law No. 2007-037 and facilitate the acquisition of land by peasants and persons living in rural areas, as well as their access to natural resources. It also recommends that the State party carry out a national debate on investment in agriculture*

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151 CESCR, *Concluding Observations, Guatemala*, E/C.12/1/Add.93, 12 December 2003.

152 CESCR, *Concluding Observations, Guatemala*, E/C.12/GTM/CO/4, § 10, 11 November 2022.

and seek, prior to any contracts with foreign companies, the free and informed consent of the persons concerned."[153]

Following the mobilization of peasant communities and international pressure, the Malagasy government revised law No. 2021-016 regarding land. A new draft law (No. 2022-013) was presented in 2022. However, the draft continues to present problems for peasants without land titles. Several proposed drafts, in particular in the mining sector, risk facilitating land expropriation processes, for these drafts provide for no effective protection mechanisms against such acts; worse still, they eliminate the presumption of ownership for peasants who have been occupying the lands for generations. It should be noted that the High Constitutional Court was requested on 7 July 2022 to examine the constitutionality of this law before its promulgation. The Court concluded that the provision of paragraph 2 of article 29 of the law in question did not comply with the Constitution, as it granted too many prerogatives to the executive power.[154] To be continued…

While it is possible to invoke article 1 of the Covenant (right to self-determination) before the CESCR, this is not possible before the ***Human Rights Committee***;[155] instead one must refer to Article 27 (rights of minorities) of the International Covenant on Civil and Political Rights. In its *General Comment No. 23*, the Human Rights Committee stated that the rights protected under Article 27 of the Covenant include the right of minorities and of indigenous peoples to the protection of their traditional activities, such as hunting or fishing, and that States should take measures to guarantee effective participation by community members in the decisions affecting

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153 CESCR, *Concluding Observations, Madagascar*, E/C.12/MDG/CO/2, 16 December 2009, § 12.

154 *Décision No. 06-HCC/D3 du 27 juillet 2022 de la Haute Cour Constitutionnelle concernant la loi No. 2022-013*, http://www.hcc.gov.mg/?p=7991

155 Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights explicitly excludes basing an appeal on article 1 of the Covenant.

them.[156] The Human Rights Committee then confirmed this interpretation in several cases in which indigenous peoples invoked the right of minorities to their own culture and to protect their rights over their own resources, affirming that this right includes the right to maintain their way of life, their economic activities and their means of subsistence. In the *Länsman et al. v.* ***Finland*** case, for example, the Human Rights Committee concluded that mining activities, when undertaken without consulting the indigenous peoples and which destroy their way of life or their means of subsistence, constitute a violation of the rights enshrined in Article 27 of the Covenant.[157]

In the *Ángela Poma Poma v.* ***Peru***, case, the Human Rights Committee found Peru guilty of violating Article 27 of the Covenant Digging of wells resulting in the diverting of underground water by Peru triggered the degradation of the lands of the plaintiff and of her community (descendants of the Aymara people) and the drying up of wetlands, causing the death of thousands of animals. This subsequently deprived the community of its means of subsistence (pastoral activities, raising of llamas, alpacas…). The Committee found that the Peruvian State's intervention had "considerably compromised the author's way of life and culture as a member of her community" and that it had "at no time consulted" either the petitioner or her community "about the drilling of the wells."[158]

In its *General recommendation No. 23*, the ***Committee on the Elimination of Racial Discrimination*** (CERD) pointed out that Article 5 of the Convention entailed the obligation for States to fight discrimination – *de jure* and *de facto* – in access to productive resources, especially land, of vulnerable groups in particular

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156 Human Rights Committee, General Comment No. 23, CCPR/C/21/Rev.1/Add.5, 26 April 1994, § 7.

157 *Länsman et al. v. Finland*, CCPR/C/52/D/511/1992, 8 November 1994, § 9.

158 CCPR/C/95/D/1457/2006, 24 April 2009, § 7.7.

indigenous people.[159] In its Concluding Observations regarding ***New Zealand***, the CERD noted that little progress has been made in "securing indigenous rights to self-determination" and required that the State "give greater assurance that the State party recognizes the fundamental right to self-determination of Maori and the obligation to establish shared governance with hapu."[160]

Since the creation of the mandate in 2000, the ***Special Rapporteur on the right to food*** uses all means available to denounce violations of the right to food linked to poor use of wealth and natural resources. In thematic reports, the Special Rapporteur has several times denounced violations of the right of indigenous peoples to their own resources, and most notably to land.[161] In March 2010, the Special Rapporteur presented to the Human Rights Council minimum principles for large-scale acquisition and leasing of land[162] in order to compel respect for the fundamental rights of local populations by both State and investors. In the course of numerous missions in various countries, the Special Rapporteur on several occasions denounced violations of the rights of the local populations arising from the exploitation of the wealth and natural resources or poor management of their income.[163] The majority of the Special Rapporteur's communications with States have dealt with forced evictions and displacements of peasant and indigenous communities to make the land available for mining, oil and gas production as well as for companies involved in land and forestry resources.

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159 CERD, General Recommendation No. 23: Indigenous Peoples, 18 August 1997.

160 CERD/C/NZL/CO/21-22, 22 September 2017, §§ 12, 13.c).

161 Inter alia: A/60/350, 12 September 2005; A /65/281, 11 August 2010; https://www.ohchr.org/fr/special-procedures/sr-food/annual-thematic-reports-special-rapporteur-right-food

162 A /HRC/13/33/Add.2, 28 December 2009.

163 https://www.ohchr.org/fr/special-procedures/sr-food/country-visits-special-rapporteur-right-food

In a 2003 thematic report, the ***Special Rapporteur on the rights of Indigenous Peoples*** studied the violations of the rights of indigenous peoples arising from wide-scale exploitation of natural resources and the construction of large dams in Costa Rica, Chile, Colombia, India and the Philippines.[164] And in numerous mission reports since 2001, the Special Rapporteur has denounced countless cases of violations of the right of indigenous peoples to their own resources in, among others, Argentina, Australia, Brazil, Canada, Denmark, Ecuador, Guatemala, Kenya, Mexico, New Caledonia and New Zealand.[165] A great number of the Special Rapporteur's communications with States also concern violations of the right of indigenous peoples to their own resources, especially land.

The ***Special Rapporteur on minority issues***, along with seven other Special Rapporteurs, has been seized of the matter of forced evictions of 14 members of the Isan minority (9 women, 5 men) from their lands and their houses in the village of Sab Wai, situated in the national park of Sai Thong in ***Thailand***. In a joint communication addressed to this State on 1 December 2022,[166] the mandate holders note that this country's master plan on climate disruption (2015-2050)[167] is in practice hobbled by measures criminalizing the villagers, who are characterized as "forest destroyers" and given prison terms ranging from five months to four years. According to the Special Rapporteur, "The eviction orders have been issued in the context of the Government's climate change mitigation action

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164 E/CN.4/2003/90, 21 January 2003; see also the Rapporteur's other thematic reports, https://www.ohchr.org/fr/special-procedures/sr-indigenous-peoples/annual-thematic-reports-special-rapporteur-rights-indigenous-peoples

165 https://www.ohchr.org/fr/special-procedures/sr-indigenous-peoples/country-visits

166 AL THA 3/2022, 1 December 2022, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=27542

167 This plan explicitly recognized the rights of local communities to forest resources and their role in the protection and maintenance of the ecosystem's biodiversity.

without the provision of alternative accommodation and productive land, nor adequate compensation. Allegedly, the national strategy to address the adverse effects of climate change pursues false solutions that are resulting in practice in the criminalization and impoverishment of poor small-scale farmers who depend on forests for their livelihoods, while the need to reform the energy sector is neglected." The Special Rapporteurs then asked the Thai government to supply information on this situation and, in the meantime, required that the government take all necessary precautionary measures to end the alleged violations and prevent them from recurring.

CHAPTER 2

THE RIGHT TO NON-DISCRIMINATION

Non-discrimination, with its corollary, equality, has a special place in the human rights constellation given that all human rights (civil, political, economic, social and cultural) must be realized for everyone without discrimination.

Broadly defined, discrimination consists of treating differently two persons or groups of persons who are in a comparable situation. Conversely, treating equally two persons or groups of persons who are in different situations can also constitute discrimination. The international human rights instruments prohibit all distinction, exclusion, restriction or any other form of differentiated treatment within a given community – as well as among communities – which cannot be justified or which impair the enjoyment of human rights by all based on the principle of equality.

Observing the contemporary world from this perspective, one sees that hundreds of millions of persons across the world continue to suffer discrimination because of the people or the ethnic group they belong to, because of their language, their beliefs, their socioeconomic situation, their family background, their political opinion, their sex, their age (e.g. the elderly, "a burden on society", or youth with little job training or no job) or their sexual orientation.

It is noteworthy in this regard that a country considered to be governed under the rule of law according to international criteria[168]

[168] By this is meant an institutional system within which public power is subject to the rule of law. In other words, it is a State that respects the independence of the judiciary and judicial norms, both national and international, to which it is

can nonetheless practice discrimination with regard to the majority of its population, as demonstrated by South Africa under its apartheid regime.

Though it has blurred national boundaries, neoliberal globalization is far from diminishing the various forms of discrimination. Rather, it has displaced them. In some respects, they are more insidious, sometimes even exacerbated, expressing themselves in the form of unspeakable police brutality. Not only has globalization weakened States, calling universal public services into question, it has also encouraged the emergence of new forms of discrimination within societies. In some places, divisions between men and women have taken new forms, while in others traditional divisions have strongly resurfaced, and we are witnessing the rise of a kind of apartheid on a global scale: between nationals and non-nationals, generations, the healthy and the disabled, peasants and city dwellers, etc., calling social cohesion and democracy into question see insert at the end of this chapter).

Moreover, the outbreak and continuation of numerous conflicts in various regions of the world, including – and especially – armed conflicts, the increase in international migration and forced internal displacement, as well as social regression and the emergence of clearly xenophobic and "racist" political parties,[169] plus inequality at

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subject, and enforces the equality of all persons before the law, while prohibiting all arbitrary practices and all discrimination. (inter alia http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/qu-est-ce-que-etat-droit.html)

169 The concept of race, introduced in the nineteenth century by A. Gobineau to establish a hierarchy among human groups to justify the exploitation of certain groups by others, was widely used by the colonial powers to justify their exploitation of conquered peoples and was taken up by Nazi ideologues to underpin their policies of extermination of millions of human beings considered subhuman (http://www.bibliomonde.net/auteur/joseph-arthur-gobineau-790.html).
However, this term continues to be used in daily life and in politics. It is also

all levels of society... these are all illustrations of the fertile ground for such discrimination.

The permanent "war on terror" declared over two decades ago by former President George Walker Bush has also exacerbated racism and discrimination. And numerous other governments have exploited this "war" to criminalize their political opponents.[170]

As already emphasized, equality and non-discrimination are fundamental pillars of human rights, inseparable from the enjoyment of all other human rights. Yet, notwithstanding legislative and educational efforts, discrimination remains common in areas of civil and political rights as well as in areas of economic, social and cultural rights, and is the subject of much disagreement between the various actors in society.

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used in international human rights instruments. In the latter, discrimination founded on race and skin color refers to the "ethnic origin of an individual" (see Committee on Economic, Social and Cultural Rights, General Comment No. 20, Non-discrimination in Economic, Social and Cultural Rights, E/C.12/GC/20, § 19). It should be emphasized that the definition of "racial discrimination" given in the International Convention on the Elimination of All Forms of Racial Discrimination applies not only to skin color or ethnic origin, but also to all discrimination "in the political, economic, social, cultural or any other field of public life" (Art. 1.1). Moreover, the 182 States parties to this Convention (as of 19 January 2023) "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination…" (Art. 4).

170 In reporting to the seventy-second session of the General Assembly, the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Comprehensive Implementation of and Follow-up to the Durban Declaration and Program of Action, reported that "Far-reaching and ambiguous definitions of terrorism and violent extremism have enabled many countries to criminalize the legitimate exercise of fundamental rights, including freedom of expression and freedom of peaceful assembly and of association" (A/72/287, 4 August 2017, § 35).

In this chapter, we shall present a general overview of the scope of the right to non-discrimination in all its aspects (civil, political, economic, social and cultural), given the universality, interdependence and indivisibility of human rights. As we shall see in the other chapters concerning certain jurisprudence, it sometimes happens that aggrieved individuals or communities can seize a mechanism that deals with civil and political rights to ultimately obtain a decision that has an impact on economic, social and cultural rights. However, in presenting the cases in this chapter, we will focus on ESCR violations.

A. Definition and Content of the Right to Non-Discrimination

The right to non-discrimination constitutes an inalienable – hence basic – human right and has been enshrined in both international and regional instruments. As human rights are interdependent, it is an inherent aspect of civil and political rights as well as economic, social and cultural rights.

The right to non-discrimination proceeds from the general postulate of the equal dignity of all human beings affirmed in the ***Charter of the United Nations*** and ***the Universal Declaration of Human Rights*** (UDHR) and all international human rights instruments.

Among the purposes and principles of the United Nations figures the realization of "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all ***without distinction as to race, sex, language, or religion***" (Charter of the United Nations, Chapter I, Art. 1.3; emphasis added). This formulation has also been used in Chapter IX, Art. 55.c.

Article 2 of the Universal Declaration of Human Rights prohibits all forms of discrimination that extend beyond the criteria mentioned in the United Nations Charter:

> *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Other provisions of the UDHR prohibit discrimination in specific areas such as work, the civil service and the judiciary. "Everyone, without any discrimination, has the right to equal pay for equal work" (Art. 23.2). "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination" (Art. 7). "Everyone has the right of equal access to public services in his country" (Art. 21.2). "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal (…)" (Art. 10).

The ***International Convention on the Elimination of All Forms of Racial Discrimination*** was the first international human rights convention under which States began to codify the rights enshrined in the Universal Declaration. It also constitutes the primary international instrument devoted to "racial discrimination".[171] Article 1.1 of the Convention defines the term "racial discrimination" broadly, as follows, not limiting it to skin color and ethnic origin:

> *… any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

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[171] See note 169.

The ***Committee on the Elimination of Racial Discrimination*** (CERD) has reaffirmed that the term ***descent*** in reference to treatment accorded to a person involves not only "race" but "includes discrimination against members of communities based on forms of social stratification such as ***caste and analogous systems of inherited status*** which nullify or impair their equal enjoyment of human rights" (emphasis added).[172]

The identification of the national or ethnic origin of an individual or a group of individuals is often problematic since many States, although multi-ethnic, refuse to recognize it. In this regard, the ICERD considers that "such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned".[173]

One should also note that this Convention is not limited to prohibiting all forms of discrimination. By ratifying it, States parties commit themselves to setting limits on freedom of expression by condemning "all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form" (Art. 4).

The ***International Covenant on Civil and Political Rights*** (ICCPR) unequivocally requires the observance of non-discrimination regarding all the rights enshrined in it.

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Art. 2.1)*

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172 CERD, General Recommendation XXIX on article 1, paragraph 1, of the Convention (Descent), preamble, §§ 6, 7.

173 CERD, General Recommendation VIII, adopted on 9 August 1990.

The ICCPR makes no distinction between nationals and non-nationals,[174] and its Article 26 unambiguously enshrines equality before the law:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*

This principle is confirmed by *General Comment No. 15* of the ***Human Rights Committee*** on the situation of foreigners with regard to the Convention,[175] stating that "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof" (§ 2).

Overall, the United Nations treaty bodies accord a capital importance to the principle of non-discrimination. Regarding civil and political rights, the Human Rights Committee has declared: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."[176]

It should be emphasized that equality of treatment does not necessarily mean identical treatment, and every difference in treatment does not constitute discrimination. As the Committee has observed, "(…) not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is

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174 However, the ICCPR (Art. 25) permits the limiting of certain political rights, such as the right to vote, to "citizens" (nationals).

175 Adopted 11 April 1986 at the twenty-seventh session.

176 *Human Rights Committee, General Comment No. 18: Non-discrimination*, § 1, 10 November 1989.

legitimate under the Covenant."[177] For example, setting a minimum age requirement for a candidate to run for office cannot objectively be considered discriminatory.[178]

Special measures or preferential treatment are also allowed and may even be necessary, temporarily, to correct *de facto* discrimination. The Committee has stipulated that:

> *… in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.*[179]

One must also take into account that, as ***UNESCO*** has pointed out, "A law or policy that was originally considered reasonable might become discriminatory over time because of changing social values within a given society. As societies become better informed and more gender- and ethnicity-sensitive, they also tend to become more poverty-sensitive."[180]

Taking poverty as an example, in other periods and societies, poverty was perceived as a person's destiny or as part of the social hierarchy whereas today it is considered a human rights violation.[181]

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177 Ibid, § 13.

178 Human Rights Committee, *General Comment No. 25* (Participation in Public Affairs and the Right to Vote), 12 July 1996, § 15.

179 Human Rights Committee, *General Comment No. 18: Non-discrimination*, § 10.

180 https://web.archive.org/web/20110127020016/http://www.unesco.org/new/en/social-and-human-sciences/themes/human-rights/poverty-eradication/non-discrimination/

181 See, inter alia: *The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution*, (final report prepared by the expert of the former Sub-Commission on Prevention of Discrimination and

The ratification of human rights instruments requires ratifying States to take concrete measures to eliminate all forms of discrimination and to implement positive actions in favor of groups considered "vulnerable" (e.g. women, ethnic or religious minorities, indigenous peoples, migrants, refugees).[182]

ESCR and Non-Discrimination

The relationship between matters of non-discrimination and economic, social and cultural rights is noteworthy, yet, notwithstanding abundant jurisprudence (at the national, regional and international levels), some States contest the justiciability of economic, social and cultural rights. Others invoke as a shield "the progressive realization" of these rights, citing lack of "available resources" (Art. 2.1 of the ICESCR). Yet the CESCR has pointed out that this article "should not be misinterpreted as depriving the obligation of all meaningful content. (…) It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[183] Furthermore, the non-discrimination principle is an "immediate and cross-cutting obligation."[184] It is "neither subject to progressive implementation nor dependent on available resources."[185] This builds directly on Article 2.2 of the ICESCR:

Protection of Minorities, Mr José Bengoa, E/CN.4/Sub.2/1997/9, 30 June 1997); and the final draft of the *guiding principles on extreme poverty and human rights*, submitted by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, A/HRC/21/39, 18 July 2012, adopted by the Human Rights Council as Resolution 21/11, 18 October 2012.

182 In this regard, of particular relevance to the protection of the above-mentioned groups are the ICCPR's Articles 14.1 (on equality before the courts and tribunals); 18 (on freedom of thought, conscience and religion); 19 (on freedom of expression); 20.2 (on the prohibition of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence); 24 (on the child's right to protection); and 27 (on the rights of minorities).

183 CESCR, *General Comment No. 3. The nature of States parties' obligations*, § 9.

184 CESCR, *General Comment No. 20, Non-discrimination in economic, social and cultural rights*, E/C.12/GC/20, § 7.

185 CESCR, *General Comment No. 18*, E/C.12/GC/18, § 33.

> *"The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

Although the ICESCR gives no definition of non-discrimination, the CESCR has been willing to weigh in on it:

> *It is to be noted that discrimination constitutes any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment.*[186]

For the CESCR, the category "other status", mentioned in Article 2.2 of the ICESCR, comprises among other elements (not an exhaustive list): "age" (e.g. access by youth to training and employment or by the elderly to retirement pensions); "place of residence" (disparities between rural and urban areas, nomads, displaced persons etc.); "disability"; "sexual orientation and gender identity". But this category could also include "the denial of a person's legal capacity because s/he is in prison, or is involuntarily interned in a psychiatric institution, or the intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability".[187]

Regarding a person's economic and social situation, the CESCR has been clear.

> *Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata*

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186 CESCR, *General Comment No. 20*, E/C.12/GC/20, § 7.

187 Ibid., §§ 29, 34, 28, 32, 27 respectively.

within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.[188]

The CESCR reminds also that:

Discrimination undermines the fulfillment of economic, social and cultural rights for a significant proportion of the world's population. Economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socioeconomic inequality, often because of entrenched historical and contemporary forms of discrimination.[189]

Regarding nationality as a consideration affecting the Covenant's rights, the CESCR is unequivocal.

The ground of nationality should not bar access to Covenant rights, e.g. all children within a State, including those with an undocumented status, have a right to receive education and access to adequate food and affordable health care. The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.[190] (emphasis added)

The principle of non-discrimination applies not only to public entities. As in the case of disabled people, the Committee has emphasized: "(…) it is essential that private employers, private suppliers of goods and services and other non-public entities be subject to both non-discrimination and equality norms in relation to persons with disabilities."[191]

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188 Ibid., § 35.

189 Ibid., § 1.

190 Ibid., § 30.

191 CESCR, *General Comment No. 5, Persons with disabilities*, 9 December 1994, § 11.

Finally, the CESCR has emphasized non-discrimination in all its General Comments on the rights enshrined in the ICESCR (inter alia, food, water, adequate housing, education, health and work).[192]

B. Pertinent International and Regional Norms

1. At the International Level

Besides the above-mentioned international instruments, the following texts concerning the right to non-discrimination deserve mention.

Article 1 of the ***Convention on the Elimination of All Forms of Discrimination against Women*** gives an extended definition of discrimination based on the provisions of the Convention.

> *"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

It should be emphasized that this Convention also covers: the full development and advancement of women (Art. 3); the elimination of prejudices and customary practices founded on gender stereotypes (Art. 5); trafficking of women and the exploitation of women's prostitution (Art. 6); political and public life (Arts 7, 8); equal rights in education (Art. 10); the elimination of discrimination in employment and health care and in economic and social life (Arts 11, 12, 13); equality before the law (Art. 15); and the elimination of discrimination against women in all matters of marriage and family relations (Art. 16).

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[192] In particular: CESCR, General Comments No. 4; No. 11; No. 12; No. 13; No. 14; No. 15; No. 18: https://www.ohchr.org/en/treaty-bodies/cescr/general-comments

The ***Convention on the Rights of the Child*** requires that States parties, inter alia, take *"all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members"* (Art. 2.2).

The ***Convention on the Rights of Persons with Disabilities*** prohibits discrimination based on all forms of disabilities.

The right to non-discrimination is also mentioned in articles 1, 7, 13, 17, 18, 25, 27, 28, 30, 43, 45, 54 and 55 of the ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***.

The ***Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief***[193] stipulates: "Everyone shall have the right to freedom of thought, conscience and religion" (Art. 1). It states further: "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief" (Art. 2.1).

The ***Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities***[194] also prohibits discrimination: "Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination" (Art. 2.1).

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[193] Adopted by the United Nations General Assembly 25 November 1981: https://www.ohchr.org/fr/instruments-mechanisms/instruments/declaration-elimination-all-forms-intolerance-and-discrimination

[194] Adopted by the United Nations General Assembly 18 December 1992: https://www.ohchr.org/fr/instruments-mechanisms/instruments/declaration-rights-persons-belonging-national-or-ethnic

Convention No. 111 of the International Labour Organization (ILO) of June 25, 1958, concerns ***the elimination of discrimination in respect of employment and occupation***. It prohibits "any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" (Art. 1.1.a). On the other hand, article 1.2 of this Convention specifies that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

The ***Equal Remuneration Convention (No. 100) of the ILO*** of 29 June 1951 states that "the term equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex" (Art. 1.b).

ILO Convention No. 169, concerning Indigenous and Tribal Peoples,[195] provides that "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples" (Art. 3.1).

In the ***UNESCO Convention Against Discrimination in Education***,[196] "the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education" (Art. 1).

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[195] Adopted 27 June 1989.

[196] Adopted 14 December 1960; entered into force 22 May 1962: https://www.unesco.org/en/legal-affairs/convention-against-discrimination-education

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** denounces "any kind of discrimination in the exercise of their rights based on any grounds such as origin, nationality, race, colour, descent, sex, language, culture, marital status, property, disability, age, political or other opinion, religion, birth or economic, social or other status" (Art. 3.1). It requires States to take all appropriate measures "to eliminate conditions that cause or help to perpetuate discrimination, including multiple and intersecting forms of discrimination, against peasants and people working in rural areas" (Art. 3.3). Article 4 prohibits all discrimination against peasant women.

The ***United Nations Declaration on the Rights of Indigenous Peoples*** provides that the indigenous, both peoples and individuals, are "free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity" (Art. 2).

The ***World Conference on Human Rights*** called upon States to bear in mind their obligation "to develop and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion" (preamble, § 5).[197]

Characterizing apartheid, genocide, slavery and human trafficking each as "a crime against humanity" (§§ 13, 14, 15), the ***Declaration of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance***[198] also recognized that "racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, color, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of

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[197] *Vienna Declaration and Program of Action*, A/CONF.157/23, 12 June 1993, preamble § 5.

[198] Adopted in Durban (South Africa) in September 2001: https://www.un.org/WCAR/durban.pdf

discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status" (§ 2). It also recognized that "racism, racial discrimination, xenophobia and related intolerance may be aggravated by, inter alia, inequitable distribution of wealth, marginalization and social exclusion" (§ 9). It further recognized that "colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences" (§ 14). The Declaration stipulates that "xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices" (§ 16). It affirms inter alia that "all peoples and individuals constitute one human family, rich in diversity. They have contributed to the progress of civilizations and cultures that form the common heritage of humanity. Preservation and promotion of tolerance, pluralism and respect for diversity can produce more inclusive societies" (§ 6).

2. At the Regional Level

Article 2 of the ***African Charter on Human and Peoples' Rights*** is explicit.

> *Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*

The African Charter further affirms that "all peoples shall be equal, they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another"

(Art. 19). It also declares that "every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance" (Art. 28).

The Convention for the Protection of Human Rights and Fundamental Freedoms, usually referred to as the "European Convention on Human Rights" (ECHR), prohibits all forms of discrimination, in line with other international instruments.

> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (Art. 14).*[199]

Protocol 12 to the ECHR establishes a ***general prohibition*** regarding discrimination:

> *1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

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[199] It should be noted however, that, while Article 14 guarantees equality in the enjoyment of the rights and freedoms enshrined in the ECHR, it has no autonomous existence. The Court can rule on a procedure for discrimination only if it has been an object of litigation relative to one of the rights protected by the ECHR. Further, when it is called upon to rule on a violation of Article 14, the Court always links this review to a substantive right guaranteed by the ECHR. In its rulings, it systematically cites the related character of Article 14, which renders it inoperable when it is invoked autonomously. However, the Court affirms that the absence of a violation of a substantive right of the Convention does not prevent a review of the allegations regarding non-discrimination. One must also emphasize that the rights and freedoms enshrined in ECHR cover vast areas such as the right to life, the right to respect of private and family life, and freedom of thought, conscience and religion (see Handbook on European non-discrimination law: https://www.echr.coe.int/documents/d/echr/Handbook_non_discri_law_ENG).

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

The ***European Social Charter*** guarantees certain economic and social rights (primarily regarding work and social protection). Article E stipulates that all the rights enshrined in the Charter must be implemented "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."

Moreover, the principle of non-discrimination is specifically mentioned in the following articles of the Charter: The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Art. 20); The right of workers with family responsibilities to equal opportunities and equal treatment (Art. 27); The right to a fair remuneration (Art. 4); The right to just conditions of work (Art. 2); Equal treatment for national and non-national workers legally established in the territory of a State party and special measures in favor of foreign workers (Art. 19); The right of employed women to protection of maternity (Art. 8); The right of persons with disabilities (Art. 15); The right of elderly persons (Art. 23); The right of children and young persons (Art. 17).

The ***American Convention on Human Rights***[200] also prohibits all forms of discrimination.

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language,

[200] Equality before the law and equal protection under the law are mentioned in Article 24 of this Convention. Equality of the rights of spouses is also mentioned (Art. 17).

religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. (Art. 1.1)

C. States' Specific Obligations

In general, the international human rights instruments impose three levels of obligation: ***respect***, ***protection*** and ***implementation***. At this point, given the transversal and non-derogable character of the right to non-discrimination, the nature of States' obligations in this area is worth reviewing. In brief, States must take ***legislative***, ***administrative***, ***judicial*** and all other "***adequate measures***" to honor their commitments.

1. Legislative and Administrative Measures

A State may not issue reservations regarding the right to non-discrimination, given that it is a non-derogable right. Such reservations are thus incompatible with the purpose of international human rights instruments.[201] In this regard, the case of Saudi Arabia constitutes an anomaly, given that this State ratified the Convention on the Elimination of All Forms of Discrimination against Women with a "general reservation". Accordingly, the Committee on the Elimination of Discrimination against Women (CEDAW) "reminds the State party that its general reservation is incompatible with the object and purpose of the Convention and is thus impermissible under Article 28 of the Convention".[202]

States are required to "respect" and to "guarantee" all the human rights of all persons on their territory and all those under their authority.[203] This means non-nationals as well as nationals.[204] This

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201 E.g. Human Rights Committee, *General Comment No. 31*, § 5.

202 CEDAW, Concluding observations on the combined third and fourth periodic reports of Saudi Arabia, CEDAW/C/SAU/CO/3-4, 14 March 2018, § 10.

203 Ibid § 10.

204 However, Article 25 of the ICCPR limits some political rights to "citizens", i.e. nationals.

holds also for persons who are not on a State's national territory but who are under the jurisdiction of that State (e.g. military occupations, trusteeship territories, peace-keeping operations etc.).

Although the International Covenant on Civil and Political Rights formally prohibits "any propaganda for war" and "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (Art. 20), in general the international human rights instruments, and in particular both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, constitute veritable road maps for States that wish to prevent all forms of discrimination in the implementation of all human rights (civil, political, economic, social and cultural) and all discrimination based on gender.

As emphasized above, the right to non-discrimination must be linked to the principles of equality before the law and equal protection under the law. In this regard, the Human Rights Committee has indicated that "when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory."[205]

Of course, States' obligations are not limited to "not violating" human rights, for States must also act so that these rights are respected by third parties, international institutions and organizations and national and transnational business enterprises. For example, the Convention on the Elimination of Discrimination against Women requires of States parties that they "take all appropriate measures to eliminate discrimination against women by ***any person, organization or enterprise***" (Art. 2.e; emphasis added).[206]

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[205] Human Rights Committee, *General Comment No. 18*, § 12.

[206] Article 2.1.d of the *International Convention on the Elimination of All Forms of Racial Discrimination* imposes a similar obligation upon States parties. The Human Rights Committee and the CESCR have adopted positions along these lines (see

"In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated," i.e. regarding economic, social and cultural rights.[207] In this regard, the CESCR, for example, considers that special measures in favor of the disabled "to reduce structural disadvantages (…) should not be considered discriminatory".[208] In the Convention on the Elimination of All Forms of Discrimination Against Women, "temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination" (Art. 4.1).

2. Judicial Measures

Under international human rights law, States must provide avenues of effective remedy for all persons under their jurisdiction, ***without discrimination***, in order to enable them to assert their rights.[209] Thus, a State's competent authorities are obligated to investigate all allegations of human rights violations. In the event of a violation, States must take measures, including "appropriate compensation" in the form of "restitution, rehabilitation and measures of satisfaction", and "guarantees of non-repetition" such as "changes in the State Party's laws and practices".[210]

In another vein, according to the CESCR, a State where "any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of

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inter alia Human Rights Committee, *General Comment No. 31*, § 8; CESCR, *General Comment No. 14*, §§ 35, 39, 51).

207 CESCR , *General Comment No. 20* (Non-discrimination), § 36.

208 CESCR, *General Comment No. 5 (*Persons with Disabilities), 9 December 1994, §§ 9, 18.

209 Inter alia, *Universal Declaration of Human Rights*, Article 8; ICCPR, Article 2.3; *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 6.

210 Human Rights Committee, *General Comment No. 31*, § 16.

the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant."[211] The Committee moreover affirms: "Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[212]

3. International Cooperation

As already discussed (Part I, Chapter 1.D), international cooperation and assistance are enshrined in the United Nations Charter (Arts. 55, 56), in the ICESCR (Art. 2.1) and in the Declaration on the Right to Development (Arts. 3 and 4 in particular). In accordance with these instruments, States with insufficient means or which are unable to honor their human rights commitments toward their populations can rely on the support of other States, given that States are obliged, individually and collectively, to fulfill these rights. This support must not be limited to financial matters but must include all sorts of cooperation: exchanges of experience, cultural exchanges, training etc. International organizations and United Nations agencies must, depending on their area of competence, make contributions for the effective implementation of all human rights.

While, in the fight against impunity, States are obliged to cooperate on the judicial level to extradite perpetrators of human rights violations, they are also under an obligation not to:

> *extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, (...) either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.*[213]

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211 CESCR, *General Comment No. 3*, § 10.

212 CESCR, *General Comment No. 9*, E/C.12/1998/24, 3 December 1998, § 15.

213 Human Rights Committee, *General Comment No. 31*, § 12.

International cooperation should be based on the principle of States' sovereign equality (United Nations Charter, Art. 2.1) and the right of all peoples to determine their political status in order to freely assure their economic, social and cultural development (Common Art. 1.1 of the two international human rights covenants). On this basis, all discrimination among States is prohibited.

D. Examples of Implementation

1. At the National Level

The legislation in most countries enshrines the principle of non-discrimination, of equality of all before the law and of equal protection under the law. The legislation of some countries such as India[214] and Mexico[215] can be characterized as being exemplary although in practice most of the population of these countries suffers from discrimination (caste system, indigenous peoples, migrants, social status etc.).

This is equally so for the overwhelming majority of the world's population. Taking into account that most States are multi-ethnic and that the power of these States is quite often held by an ethnic minority or social class, or even a clan, the majority of these populations are effectively excluded economically as well as socially. Thus, legislation adopted often remains a dead letter or is

[214] The Constitution of India, Part III, "Fundamental Rights" (as of 26 November, 2021), prohibits all discrimination "on grounds only of religion, race, caste, sex, place of birth or any of them" (Art. 15.1). It abolishes the category of "untouchability", "and its practice in any form is forbidden." (Art. 17). It guarantees, inter alia, "equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State" (Art. 16. 1).

[215] The Mexican constitution, Chapter I, Art.1.3 (as of 29 May 2023), on human rights and their guarantees states: "Any discrimination based on ethnic or national origin, gender, age, disability, social status, health condition, religion, opinion, sexual preferences, marital status, or any other discrimination affecting human dignity and which might have the effect of nullifying or diminishing the rights and freedoms of any person is prohibited."

implemented for only part of the population (minority or majority), thus deviating from the basic principles of a State under the rule of law. This is aggravated because, being marginalized, these populations often are unaware of their rights and of the existence of the pertinent legislation.

Nonetheless, the adoption of good legislation at the national level is the first step in fighting all forms of discrimination and impunity for violations of human rights. Further, the use of regional and international protection mechanisms is conditioned, in principle, on the exhaustion of domestic remedies.[216] Thus, citizens, human rights activists and social movements, when national conditions allow, should use domestic means of remedy.

2. At the Regional Level

The rulings handed down by the ***European Court of Human Rights*** since its creation have incited the States concerned to modify their legislation and their administrative practice in numerous areas including those covering the ***right to non-discrimination***. The European Court affirmed that this is a matter of a "fundamental principle", that "underpins the Convention".[217] This principle supposes that equal treatment be granted to equal individuals and implies also the existence of a norm prescribing equal treatment.

In particular, the Court ruled against ***Belgium*** regarding discrimination against children in matters of inheritance. As a single mother, Paula Marckx was obliged to adopt her daughter, Alexandra, and to be subject to family counseling. Alexandra could not inherit from her mother because she was considered by Belgian law (at the time) to be illegitimate. In its 13 June 1979 ruling, the Court found a violation of Article 14, combined with Article 8, of the

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[216] Exceptions to this condition can be granted, depending on the case and the mechanisms, if a State's judicial system is not diligent.

[217] *Affaire Strain et al. contre Roumanie*, 21 July 2005, § 59.

European Convention of Human Rights (ECHR).[218] This ruling triggered a "deep reform" of Belgian family law, even though the process required several phases (1987, 2006, 2014, 2018), resulting in equality of rights for children born out of wedlock.

In 1995, the dockers union of ***Russia*** (SDR) created a section in the port of Kaliningrad, in a break with the traditional maritime transport employees unions. In May 1996, the SDR took part in collective bargaining that resulted in a new collective agreement extending the length of annual vacations and raising pay. Consequently, in two years the number of its members rose from 11 to 275 (as of 14 October 1997). According to the plaintiffs, the Kaliningrad maritime trade company at this time employed some 500 dockers. On 14 October 1997, at the initiative of the SDR, the dockers went on strike to obtain better pay, better working conditions, medical insurance and life insurance. On 28 October, after a two-week strike, they returned to work without their demands having been met. They alleged that, since that time, the Kaliningrad maritime trade company management harassed the SDR members to sanction them for having taken part in the strike and to incite them to withdraw from the union. In its final judgment, the Court found it "crucially important that individuals affected by discriminatory treatment should be provided with an opportunity to challenge it and should have the right to take legal action to obtain damages or any other form of reparation. Therefore, States are required under Articles 11 and 14 of the ECHR to set up a judicial system that ensures real and effective protection against anti-union discrimination."[219]

A complaint filed with the ***European Committee of Social Rights*** against ***Croatia*** concerning the ethnic Serbian population displaced during the war in Croatia, involved families who were unable to

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218 *Affaire Marckx c. Belgique*, 13 June 1979.

219 *Danilenkov and Others v. Russia*, Final Judgment, 10 December 2009, § 124.

recover the residences that they had occupied before the conflict and who could not benefit from financial compensation for their loss. In its decision of 22 June 2010, the Committee concluded that there had been a violation of Article 16 in light of the non-discrimination clause of the Charter preamble.[220]

At ***Mexico's* request**, the ***Inter-American Court of Human Rights*** provided a landmark advisory opinion on the rights of clandestine immigrant workers in the ***United States***.[221] In its opinion of 17 September 2003, the Court concluded, inter alia, that "the 'principle of equality and non-discrimination', given that it is anchored in jus cogens, has an imperative character. Consequently, it is binding on all States and gives rise to effects regarding third parties, including individuals. This implies that the State, at both the domestic and the international level, may not act in contradiction with the 'principle of equality and non-discrimination' to the detriment of a given group of persons."[222] The Court stipulated that "the exercise of a remunerated activity is the sole criterion allowing to designate a person as a 'worker'". Once this designation has been established, the Court affirmed, the worker benefits automatically from labor rights. These rights must be recognized and guaranteed, even if the migrant's situation is irregular."[223] It further clarified that the State

220 *COHRE v. Croatia*, Processed complaint No. 52/2008.

221 *Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants*, §§ 1 – 4, https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf and the presentation of Amaya Ubeda de Torres on said opinion, https://web.archive.org/web/20061207215403/http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=98&id_rubrique=6

222 Hennebel, Ludovic, « L''Humanisation' du droit international des droits de l'homme, commentaire sur l'avis consultatif n°18 de la Cour interaméricaine relatif aux droits des travailleurs migrants » (The 'Humanization' of International Human Rights Law: Comments on the Inter-American Court of Human Rights' Advisory Opinion No. 18 Regarding the Rights of Migrant Workers) Revue Trimestrielle des Droits de l'Homme, Vol. 59, 2004, p. 747 (French only. Our translation).

223 Ibid.

had the obligation "to monitor human rights, especially labor rights, among individuals. […] The State must prevent labor rights violations of private sector employees and ensure that their contractual relations do not violate human rights. Employers, for their part, are under obligation to respect the labor rights of workers. The State engages its international responsibility from the moment it tolerates discriminatory practices detrimental to migrant workers."[224]

Through a campaign named "Operaçao brilhante", the government of ***Angola*** set up a program of wide-scale expulsion of foreigners present on its territory. Many of these foreigners, of Gambian origin, were expelled in particular from Angola's diamond mining areas. In 2004, the matter was brought before the ***African Commission on Human and Peoples' Rights***. In its judgment handed down in May 2008, the Commission ruled that the government's expulsions were clearly aimed at non-nationals, something that the government did not contest. These measures discriminated against foreigners, which resulted in flagrant violations of their human rights. The victims themselves affirmed that the violations of which they were victims (besides expulsion, expropriation, arrests, arbitrary detention, confiscation of identification documents) were motivated by their foreign origins. The Commission recalled that the right of a State to expel an individual from its territory was not absolute and can be subject to limits pertaining to non-discrimination founded on a person's origins, in particular nationality. The Commission added that the rights defined by the African Charter on Human and Peoples' Rights must be respected for all, without discrimination, both nationals and non-nationals. Thus, the Commission found against the Angolan State for violation of several articles of the African Charter, notably the fundamental right to equality and non-discrimination guaranteed by the Charter's Article 2. It enjoined the Angolan State to take all necessary measures

[224] Ibid.

to restore the victims' situation relative to the violation of their rights that had occurred owing to the wide-scale expulsion.[225]

3. At the International Level

In the *Marcia Cecilia Trujillo Calero v. Ecuador* case,[226] the ***CESCR*** noted discriminatory treatment regarding the right to social security of stay-at-home women without income in ***Ecuador***. The plaintiff declared that "women who were responsible for looking after their homes generally made use of the voluntary affiliation regime; that this regime nonetheless had serious restrictions for unpaid domestic workers inasmuch as it was intended for independent workers and professionals, usually men. Among other requirements, unpaid female domestic workers had to contribute on the same basis as independent workers, including professionals, despite not having a salary, thus placing them at a disadvantage compared to such persons, most of whom had fixed incomes."[227] In its decision of 26 March 2018, the CESCR concluded that there had been a violation of Article 9 of the ICESCR (everyone's right to social security). It requested that Ecuador, inter alia, grant the plaintiff "the benefits to which she is entitled as part of her right to a pension", an "adequate compensation for the violations suffered during the period in which she was denied her right to social security and for any other harm directly related to such violations"; that the State "prevent similar violations in the future" and "ensure that its legislation and the enforcement thereof are consistent with the obligations established under the Covenant".[228]

In its concluding observations regarding ***Kenya***, the CESCR, concerned by, among other things, the "long delay in adopting

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225 *Institute for Human Rights and Development in Africa vs Angola*, African Commission on Human Rights, AHRLR 43 (ACHPR 2008) https://www.refworld.org/jurisprudence/caselaw/achpr/2008/en/16771

226 E/C.12/63/D/10/2015, 14 November 2018.

227 Ibid., § 19.3.

228 Ibid., §§ 20 – 23.

legislation and policies that are crucial to the realization of the economic, social and cultural rights enshrined in the Constitution"; the frequent non-implementation of "the decisions of its courts"; and "the absence of comprehensive anti-discrimination legislation; enjoined Kenya inter alia to "expedite the adoption of pending legislation and policies, including the Community Land Bill, the Social Protection Bill, the Water Bill, the Housing Bill, the Health Bill and the National Social Health Insurance Fund Bill; (…) implement the decisions of its [national] courts without delay"; and "adopt a comprehensive anti-discrimination law that prohibits discrimination, direct or indirect, on all grounds expressed in Article 2 of the Covenant (...)".[229]

The ***Committee on the Rights of Persons with Disabilities*** considered a case of the violation of the rights of an albino mother, victim of an attack during which her arms were cut off.[230] Albinos are often victims of aggression in Tanzania for purposes of witchcraft, due to the belief that parts of their bodies bring wealth and prosperity. In this case, Tanzania was reproached for not having dealt seriously with the matter, which had ended with the acquittal of the assailants for lack of proof. There was a further reproach that the State had "failed to ensure that persons with albinism are protected from exploitation, violence and abuse, and that impunity remains for all related crimes, while such practices are widespread and the authorities are aware of them".[231] In its decision of 19 September 2019, the Committee concluded that there had been a violation of the right of non-discrimination and requested that, among other things, the State: "prosecute and punish the perpetrators"; grant the plaintiff "effective remedy, including

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229 CESCR, Concluding Observations on the report of Kenya covering the second to fifth periodical reports, E/C.12/KEN/CO/2-5, 6 April 2016, §§ 5, 6, 19, 20.

230 *Z v. United Republic of Tanzania*, CRPD/C/22/D/24/2014, 15 October 2019, https://juris.ohchr.org/casedetails/3131/fr-EN

231 Ibid., § 3.8.

compensation, proper medical treatment, redress for the abuses suffered, support devices such as functional prostheses, rehabilitation, and the support necessary to enable her to live independently again"; take measures to prevent similar violations; enact legislation making it a crime to use body parts in witchcraft; and set up awareness-raising campaigns regarding the rights of the disabled.[232]

The ***Human Rights Committee*** considered a case concerning the Canadian law on the status of Indians, which discriminates against Indian women in ***Canada***.[233] Since 1906, Canadian law has provided that "Indian status, a legal construct created and applied to regulate wide-ranging facets of the lives of members of the First Nations, was defined by Canadian law on the basis of patrilineal descent, excluding maternal lines of descent". This law accords advantages that are both material (e.g. right to request broad health care coverage, financial support for post-secondary studies, tax exemptions) and immaterial (cultural identity, feeling of identification and of belonging). Thus, the plaintiffs who are descendants of women of the First Nations are not considered Indians because their ancestor has not transmitted to them the status. Noting "that such a discriminatory distinction between members of the same community can affect and compromise their way of life",[234] the Committee held that there was "a violation by the State party of the authors' rights under articles 3 and 26, read in conjunction with article 27, of the Covenant".[235] The Committee requested that the State grant the plaintiffs full compensation and that Canada take all

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232 Ibid., § 9.

233 *Sharon McIvor et Jacob Grismer v. Canada*, CCPR/C/124/D/2020/2010, 20 November 2019, https://juris.ohchr.org/casedetails/3081/fr-EN

234 Ibid., § 7.9.

235 Ibid., § 8.

necessary legislative measures to end this persistent discrimination.[236]

Among other things, "concerned about the continuation of the 'state of constitutional emergency' and the militarization of the conflict with the Mapuche" as well as the application of Law No. 18.314 (an anti-terrorist act) "in a disproportionate manner to members of the Mapuche community", the ***CERD*** requested that ***Chile*** design, "in consultation with the Mapuche people, public policies that promote intercultural dialogue and foster peace in conflict zones", and ensure "that the Counter-Terrorism Act is not applied to members of the Mapuche community for acts that take place in connection with the expression of social needs".[237]

Preoccupied by discrimination founded on the caste system and untouchability, the CERD requested that ***Nepal*** define and criminalize in its legislation all forms of racial discrimination mentioned in Article 1 of the Convention; "amend the Caste-based Discrimination and Untouchability (Offence and Punishment) Act of 2011 to extend the statute of limitations for submitting a complaint"; eliminate "exploitative and deceptive recruitment practices towards migrant workers, and bring those responsible for human trafficking and contemporary forms of slavery to justice"; and "take all necessary measures, including through the implementation of relevant laws, to eliminate patterns of land distribution that represent *de facto* discrimination against Dalits and other marginalized castes or ethnic groups".[238]

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236 Ibid., § 9.

237 CERD, Concluding Observations on the 22nd and 23rd reports of Chile, CERD/C/CHL/CO/22-23, 13 September 2022, §§ 20, 24, 21.d, 25.b respectively.

238 CERD, Concluding Observations on the 17th to 23rd periodic reports of Nepal, CERD/C/NPL/CO/17-23, 29 May 2018, §§ 7, 8, 12.a, 28.c, 30, respectively.

Since the creation of the mandate (1993),[239] the ***United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*** has studied the numerous aspects of this subject and formulated recommendations with a view to preventing and, when necessary, combating such violations. Among them one might mention: the resurgence of neo-fascism and neo-Nazism; discrimination against immigrants and migrant workers; antisemitism; the exploitation and manipulation of ethnicity for political purposes and the use of Internet to disseminate racism and racial discrimination; the stigmatization of Muslims and Arabs; identity tensions and the rejection of ethnic and cultural diversity; the effect on racism of constructions based on identity; the hierarchization of forms of discrimination and the intellectual legitimization of racism and xenophobia; the rise of parties and movements with racist and xenophobic programs; compensation for racial discrimination originating in slavery and colonialism; the threat to racial equality from nationalist populism; racial equality and the extractive economy throughout the world.[240]

Worldwide Apartheid

> As has been emphasized in this chapter, racism, racial discrimination, xenophobia and intolerance persist not only structurally, economically and socially but have a tendency to threaten democracy and social cohesion. CETIM's statement to the Durban Review Conference in 2009 (the World conference against Racism) is as relevant as ever, bringing clarification in this regard.[241] Herewith several excerpts:

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239 Commission on Human Rights, Resolution 1993/20, adopted without a vote, 2 March 1993.

240 https://www.ohchr.org/en/special-procedures/sr-racism/annual-thematic-reports

241 CETIM written statement "DURBAN I Step Forward, DURBAN II Steps Backward?" presented to the Durban Review Conference in Geneva, 20 – 24 April 2009, https://www.cetim.ch/durban-i-step-forward-durban-ii-steps-backward/

(…) "racism, in such forms as one sees it evolving today, cannot be summed up in the evil practices and attitudes of individuals or groups or in bad practices of States, of employers and others even if these murderous and degrading aspects of daily life are not only deplorable but also contrary to the minimum respect of human rights and thus to be condemned for this simple reason. But in fact and moreover, all while perpetuating itself, racism has changed the color of its skin, if one may say so.

More accurately, it no longer refers only to the color of the skin, even if this remains a dominant aspect of discrimination. It goes beyond. In the context of current polarizing globalization, the victims are not only the peoples and the people "of color", although they still constitute the majority. This racism is added to and results from a much broader social inequality, an inequality among peoples as among individuals living in the same country.

This racism has become systemic, a part of the system of exploitation and domination prevailing at the global level. It targets the poor, the producer who is not sufficiently profitable to earn enough to live well, the insolvent because they are non-consumers, the elderly because they are "wards of society", the marginalized, the non-productive, the disqualified according to whatever criteria, the informal workers, the slum dwellers, the small farmers – those who are the vast majority of the people of the world.

Thus the small white farmer of Arizona can be part of this whereas the highly qualified professional, "even" when of African of Asian origin, can escape from it, if not from the petty annoyances that he will continue to suffer painfully.

The effectiveness of the neo-Nazi groups and the extreme right as well as of other fundamentalist currents lies precisely in their ability to divide those who are excluded from the "benefits of

globalization", those populations that have become "superfluous", to make them affront each other and hate each other in the name of so-called cultural particularities or of irreconcilable "races" rather than their joining together in opposition to the policies that are at the origin of their marginalization, exclusion, precariousness, ostracism."

It is against this backdrop that one must evaluate and analyze the importance of the struggle against racism, racial discrimination, xenophobia and intolerance.

PART III

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

CHAPTER 1

THE RIGHT TO FOOD

The right to food is a human right. Recognized at the national, regional and international level, it is universal and belongs to all, individually and collectively. However, in practice, it is rarely respected.

In spite of States' solemn commitment over several decades at United Nations summit conferences to end hunger and malnutrition, hundreds of millions of persons continue to suffer. In 2021, 828 million persons suffered from hunger and 2.3 billion persons were in a situation of moderate or serious food insecurity.[242] This situation has a destructive impact on children, for some 22% of children under five throughout the world suffered from growth deficiency in 2020.[243] Worse, the number of persons without access to healthy food is clearly greater than the figures cited, and these persons are plagued by numerous sicknesses, often disabling them or causing an early death.

Another extremely troubling situation is that 80% of the persons in a situation of food insecurity live in rural areas.[244] These are food

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242 FAO, IFAD, UNICEF, WFP, WHO, 2022 The State of Food Security and Nutrition in the World, The State of Food Security and Nutrition in the World 2022 (fao.org)

243 Ibid.

244 Caroline Dommen & Cristophe Golay, *La politique extérieure de la Suisse et la Déclaration de l'ONU sur les droits des paysan·ne·s et des autres personnes travaillant dans les zones rurales, August 2020, https://www.cetim.ch/wp-content/uploads/La-politique-ext%C3%A9rieure-de-la-Suisse-et-la-D%C3%A9claration-de-lONU-sur-les-droits-des-paysan.ne_.s-ETUDE-2020.pdf* (French only). For a summary in English, see Caroline Dommen & Cristophe Golay, *Switzerland's foreign policy and the United Nations Declaration on the rights of peasants*, August 2020, https://www.cetim.ch/wp-content/uploads/Switzerlands-Foreign-Policy_Res-

producers (peasants, fishers, animal breeders and agricultural workers) who cannot manage to feed themselves properly.

One must take into account emergency situations due to armed conflict and extreme climatic conditions (mainly drought and flood), but this is only one of the many causes of hunger and malnutrition.[245] In fact, hunger and malnutrition are primarily due to social injustice, political and economic exclusion and discrimination.

The hundreds of millions of persons suffering from hunger and malnutrition are in practice excluded from all decision-making processes, even when these processes directly concern them. They are politically disenfranchised, unrepresented and generally ignored. They are also excluded from access to the resources that would allow them to lead a life of dignity, free from hunger.

Whereas the amount of food available on the planet is today easily enough to feed the world's population, these hundreds of millions remain underfed because they lack *access* to sufficient productive resources (primarily land, water, seeds, but also fishing) or an income sufficient to allow them to assure both themselves and their dependents a dignified existence free from hunger. This situation is

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Brief.pdf

[245] The unbridled industrialization of food systems throughout the world over the past several decades has resulted in reduction of biodiversity and the destruction of the environment, threatening food production in many regions. As significant as this is, it will not be dealt with in this book. In this regard, one can cite the following publications from CETIM (mostly only in French): *The UN Declaration on the Rights of Peasants (2019); La souveraineté au service des peuples suivi de L'agriculture paysanne, la voie de l'avenir ! (2017); Hold-up sur le climat. Comment le système alimentaire est responsable du changement climatique et ce que nous pouvons faire (2016); Hold-up sur l'alimentation. Comment les sociétés transnationales contrôlent l'alimentation du monde, font main basse sur les terres et détraquent le climat (2012); La propriété intellectuelle contre la biodiversité ? Géopolitique de la diversité biologique (2011); Vía Campesina : une alternative paysanne à la mondialisation néolibérale (2002); La nature sous licence ou le processus d'un pillage (1994).*

intimately linked to the unequal terms of trade between the North and the Global South.

Josué de Castro (1908-1973), a Brazilian sociologist and chair of the Executive Committee of the United Nations Food and Agricultural Organization (FAO), summed it up succinctly:

> *Hunger is exclusion. Exclusion from the land, from income, jobs, wages, life and citizenship. When a person gets to the point of not having anything to eat, it is because all the rest has been denied. This is a modern form of exile. It is death in life.*[246]

Although the right to food of hundred of millions of undernourished persons throughout the world has been relentlessly violated for decades, with rare exceptions there are no complaints filed against governments, and victims get neither reparation nor compensation.

One must not forget that the right to food is a human right and not a political option that States can choose or refuse. Its recognition thus implies obligations for States.

A. Definition and Content of the Right to Food

According to the ***CESCR***:

> *… the right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfillment of other human rights enshrined in the International Bill of Human Rights.*[247] *It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at*

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246 FAO, IGWG RTFG, Right to Food Case Study 2004: Brazil, /INF 4/APP.1, p. 9.

247 The International Bill of Human Rights comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and their optional protocols.

> *both the national and international levels, oriented to the eradication of poverty and the fulfillment of all human rights for all.*[248]

The Committee further affirms:

> *The right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.*[249]

The right to food thus has two essential components: ***availability*** of and ***access*** to food.

First, "culturally acceptable" food, in sufficient quantity and of a quality to satisfy the nutritional needs of the individual, must be ***available*** for everyone. In other words, it must be accessible directly from the earth or through adequate distribution systems.

Second, every person must have physical and economic access to food. ***Physical*** means that every person – including those physically vulnerable such as children, the aged, the sick, those who have disabilities – must have access to adequate food. ***Economic*** means that the expenditure of a person, a household or a community to ensure an adequate diet must not endanger the enjoyment of other human rights such as health, adequate housing or education.

The right to food is ***universal*** and belongs to everybody. However, in practice, it protects first of all the most vulnerable individuals and groups in a society, including those suffering from discrimination, women and children, peasant families (with or without land), indigenous and tribal peoples, small-scale fishers, the excluded in the slums, the unemployed and others.

For the ***United Nations Special Rapporteur on the Right to Food***[250]

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248 General Comment No. 12, The right to sufficient food (art. 11), 12 May 1999, § 4 [see Annex 1].

249 Ibid., § 6.

250 Jean Ziegler (2000-2008), Olivier De Schutter (2008-2014), Hilal Elver (2014-May 2020), Michael Fakhri (since May 2020).

> *the right to food is the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear.*[251]

The right to food includes the right to be helped if one cannot manage alone; however: "The right to food is primarily about the right to be able to feed oneself in dignity."[252] It includes access to the resources and means required to ensure and produce one's own subsistence: access to land; security of land tenure; access to water, to seeds, to credit, to technology and to local and regional markets, including for the vulnerable and those subject to discrimination; access to traditional fishing areas for fishing communities who depend on fishing for their subsistence; access to an income sufficient to assure a life of dignity, including for persons working in rural areas and industrial workers; and access to social security and social assistance for the most disadvantaged.

B. Pertinent International and Regional Norms

1. At the International Level

The right to food was recognized for the first time at the international level in the Universal Declaration of Human Rights in the following terms:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, and housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood,*

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251 E/CN.4/2001/53, 7 February 2001, § 14.

252 Report of the Special Rapporteur on the Right to Food, A/59/385, 27 September 2004, § 5.

old age or other lack of livelihood in circumstances beyond his control. (Art. 25)

In the ***ICESCR*** the States parties recognize "the fundamental right of everyone to be free from hunger" and commit themselves to taking measures necessary to realize "the right of everyone to an adequate standard of living for himself and his family, including adequate food (…) and to the continuous improvement of living conditions" (Art. 11).

Obviously, the right to food applies to everyone ***without discrimination***.

The right to food is also recognized in the following international instruments: the ***Convention on the Elimination of all Forms of Discrimination against Women*** (Arts. 12, 14); the ***Convention on the Rights of the Child*** (Arts. 24, 27), the ***Convention on the Rights of Persons with Disabilities*** (Arts. 25, 28); the ***Convention relating to the Status of Refugees*** (Arts. 20, 23); the ***Convention relating to the Status of Stateless Persons*** (Arts. 20, 23); and the ***Indigenous and Tribal Peoples Convention*** (especially Arts. 14 to 19).

Numerous United Nations declarations also recognize the right to food. Among them, one might mention the ***Universal Declaration on the Eradication of Hunger and Malnutrition*** (1974); the ***Rome Declaration on World Food Security and World Food Summit Plan of Action*** (1996); the ***Declaration on the Right to Development*** (1986).

The ***United Nations Declaration on the Rights of Indigenous Peoples*** recognizes that these peoples have, inter alia, "the right to own, use, develop and control the lands, territories and resources that they possess…" (Art. 26.2).

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas***, recognizes, inter alia that peasants and other persons working in rural areas have the right *"to*

determine their own food and agriculture systems" and "to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures" (Art. 15.4). It also provides for "the right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture" (19.1.c).

2. At the Regional Level

The ***Protocol of San Salvador*** is the only text at the regional level that explicitly recognizes the right to food: *"Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development."* (Art. 12)

In the same article, in order to assure the exercise of this right and to eliminate malnutrition, States parties commit themselves to perfecting the methods of food production, supply and distribution and to encouraging greater international cooperation in support of national policies in this area.

That said, Article 19.6 of the Protocol stipulates that only Articles 8.a and 13 (trade union rights and right to education) are justiciable. In other words, violations of those rights can be examined by the Inter-American Commission, or even by the Inter-American Court, but not violations of all the other economic, social and cultural rights mentioned in the Protocol. However, in their deliberations, the Commission and the Court cite the Charter of the Organization of American States (last revised on 10 June 1993) to deal with cases concerning food.[253]

[253] Article 34 of the Charter states: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: (…) j. proper nutrition, especially

The ***African Charter on Human and Peoples' Rights*** does not explicitly recognize the right to food. Nonetheless, several other rights, such as the right to health (Art. 16), can be interpreted as protecting the right to food. The African Charter also provides that the African States must realize the right to food if they have recognized it at the international level (African Charter, Art. 60), including by accepting the ICESCR. Thus, all States that have ratified the African Charter and the ICESCR have the obligation to take measures to realize their population's right to food and must prove it before the redress mechanisms on the African continent.

The ***African Charter on the Rights and Welfare of the Child*** is explicit. States parties undertake, by recognizing children's right to food, to "ensure the provision of adequate nutrition and safe drinking water" (Art. 14.2. (c)). They also commit, depending on their means, to taking all measures to assist parents and other persons responsible for the child and to provide, in case of need, material assistance and support programs, in particular concerning nutrition (Art. 20).

The ***European Social Charter*** does not directly recognize the right to food, for the European States that drafted it considered that there was no need to protect the right to food as long as the right to decent work, the right to social security and the right to welfare were assured. The protection of the right to food on the European continent is thus deficient. By ratifying the European Social Charter, the European States committed themselves to recognizing: workers' right to a remuneration that enables them and their families to have a decent standard of living (Part II, Art. 4.1); the right to social security (Art. 12); and the right to welfare and medical assistance (Art. 13), including for the mother and the child (Art. 17) and for migrant workers and their families (Art. 19).

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through the acceleration of national efforts to increase the production and availability of food."

C. States' Specific Obligations regarding the Right to Food

As a human right, the right to food is not a political option that States can choose or not. Thus, its recognition implies obligations for States, i.e. the obligation to respect, to protect and to implement the right to food – in other words, to facilitate and realize it.[254]

They must ***respect*** the right to food. This translates into specific prohibitions on actions such as driving peasants and indigenous peoples from their land; polluting water used for agricultural irrigation; implementing economic policies resulting in wide-scale unemployment or lessening of purchasing power, without a viable alternative to those who consequently will lose access to an adequate diet. For example, indigenous populations' right to land, like that of minorities, must be recognized and respected.

States must ***protect*** the right to food, i.e. prevent a third party or a national or transnational enterprise from harming the resources allowing a person or group of persons access to food.

Consequently, land rights of peasants and indigenous populations must be protected, a livable minimum wage must be guaranteed, including in the private sector, and women must not be subject to discrimination in employment and property rights.

Finally, States must ***implement*** everyone's right to food, first and foremost persons in need, meaning States must ***facilitate*** and ***realize*** their access to food.

The respect of these last two obligations depends on a compulsory ***preliminary*** obligation of States: the identification of the target population. The purpose of the obligation to facilitate the right to food is to allow these persons to have prompt access to an adequate

[254] General Comment No. 12, The right to sufficient food (art. 11), E/C.12/1999/5, 12 May 1999, §15.

diet. Concretely, States have the obligation to take measures, depending on the socioeconomic, historical and geographical situation of the country. For example, they must support peasants so that they may live and work in conditions of dignity; facilitate access of the poorest to credit; disseminate the principles of nutritional education so that the poorest can make optimal use of the resources they have; undertake agrarian reform to redistribute land unequally held; facilitate the creation of jobs guaranteeing a dignified standard of living; construct roads to facilitate the transport of merchandise and access to local markets; improve irrigation; support the family economy.

Furthermore, States have the obligation to realize the right to food of those who have ***no possibility***, on their own, of having access to an adequate diet. In other words, States must furnish a direct aid. This aid can be in the form of food for those who have no access to production or in the form of finance for those who can obtain food in the local markets. This action is important in both ***ordinary*** and ***emergency*** situations.

In ordinary situations, States must aid, in particular through social security, the aged, the disadvantaged and the marginalized whose numbers continue to increase with steady urbanization and the sundering of family ties that characterize traditional agricultural families. They must also feed prisoners and the children of the poor, for example by providing free school meals.

In emergency situations, such as natural disasters or armed conflict, States must furnish food aid as fast as possible to the vulnerable, either themselves or, if they lack the means, with the help of other States and the specialized agencies of the United Nations.

Facilitating and realizing the right to food can require the use of considerable resources. By recognizing the right to food in the

ICESCR, States commit to using to the maximum their available resources and, if need be, to appealing to the international solidarity of other States and the United Nations to implement the right to food.

D. Examples of Implementation

1. At the National Level

A significant number of States, in their constitutions, recognize explicitly (Bolivia, Brazil, Belarus, Colombia, Cuba, Kenya, Nepal…) or implicitly (Belgium, Egypt, Peru, Switzerland, Tunisia…) the right to food.[255] Such a recognition of the right to food and of the concomitant State obligations is important, for it is a guarantee of concrete implementation at the national level (adoption of laws, policies, programs etc.). As well, it allows legal action (local or national) in the event of a violation.

There are also many laws guaranteeing the population's access to food, equitable distribution of resources, including land and water, the right to use and to own them (individually or collectively), a livable minimum wage, access to fishing grounds, the organization of food aid, etc.

The right to food is notably recognized as a fundamental right in the South African constitution (Art. 27). Complaints of violations of economic and social rights in ***South Africa*** have mostly been filed under the right to adequate housing, the right to water and the right to health. As for the right to food, in the Kenneth George case,[256] the South African Supreme Court forced the government to revise its legislation on marine resources in order to ensure that their use would benefit local traditional fishing communities and not

[255] https://www.fao.org/right-to-food-around-the-globe/constitutional-level-of-recognition/en/

[256] *Minister of Environmental Affairs and Tourism v George and Others* (437/05, 437/05) [2006] ZASCA 57; 2007 (3) SA 62 (SCA) (18 May 2006).

industrial-scale fishing. A law on marine resources (*Marine Living Resources Act*) had been passed in 1998, allotting the entirety of what could be fished in one year through commercial fishing permits. The new law did not take into account traditional fishers' needs, and the permit-granting process was both complicated and costly, excluding *de facto* the traditional fishers. With the implementation of the law, entire fisher communities no longer had access to the sea, and their food situation suffered seriously. In December 2004, backed by a development organization, some 5,000 fishers filed a lawsuit at the provincial division of the Cape of Good Hope High Court, invoking their right of access to the sea in order to realize their right to food. After several months of negotiations, an out-of-court settlement was reached between the fisher communities and the Ministry of the Environment and Tourism. Consequently, nearly 1,000 traditional fishers who were able to demonstrate that they were historically dependent on marine resources as a source of livelihood obtained the right to fish and sell the product of their fishing.[257] The Court became guarantor of the accord, authorizing the fishers to recur to it if the agreement was not respected. The Court also requested that the current law be amended, ordering the government to draft a new legislative and political framework, with the full participation of the traditional fishing communities, to ensure that their rights over marine resources are guaranteed.[258] The authorities followed through on the Court's ruling, adopting in 2012 a new fishing policy.[259]

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257 Christophe Golay, *The Right to Food and Access to Justice: Examples at the national, regional and international levels* (FAO, 2009), p. 22, https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20right%20to%20food%20and%20access%20to%20Justice.pdf

258 *Realizing the right to food - Legal strategies and approaches*, International Development Law Organization, 2014, p. 13, https://www.idlo.int/sites/default/files/pdfs/publications/Realizing%20the%20Right%20to%20Food_Legal%20Strategies%20and%20Approaches_full-report_0.pdf

259 Policy for the Small Scale Fisheries Sector in South Africa, No. 474 GG 35455, 20 June 2012.

However, subsequent amendments to the law on marine resources (the Marine Living Resources Act) in 2014, and the 2016 regulation concerning this policy, did not take into account the opinions of the fishers.[260]

In 2001, the People's Union for Civil Liberties, a human rights protection NGO active in the state of Rajasthan (***India***), filed a complaint before the Supreme Court in the name of several local communities. These communities were dying of huger, while just a few kilometers away, stocks belonging to the Food Corporation of India, the public food distribution agency, were being eaten by rats. The Indian Supreme Court judges went to see for themselves and handed down several rulings favoring the plaintiffs, in the name of the right to food. They ordered, among other things, the reform of the system of food management stocks, of distribution of school lunches, and of food subsidies for the poorest.[261] These decisions are applicable in all the states of India. It is now up to the Indian government to follow through on them, with oversight by both national and international organizations. In another case, the Supreme Court prohibited intensive shrimp farming because of its highly negative effects on the means of subsistence of traditional fishers and local farmers, resulting in a loss of access to drinking water for the local population.[262]

In ***Switzerland***, the right to food is guaranteed through the protection of human dignity, which is recognized as a basic right that initially was not recognized explicitly in the constitution. In 1996, three stateless refugee brothers of Czech origin, who were in

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260 K. Auld & L. Feris, "Addressing vulnerability and exclusion in the South African small-scale fisheries sector: does the current regulatory framework measure up?" Maritime Studies 21, 533–552 (2022), https://doi.org/10.1007/s40152-022-00288-9

261 Indian Supreme Court, Public Interest Writ Petition No. 196 (Civil Writ), 2001, https://main.sci.gov.in/jonew/bosir/orderpdfold/33378.pdf

262 Indian Supreme Court, S. Jagannath v. Union of India, WP 561/1994 (1996.12.11) (Aquaculture case), https://indiankanoon.org/doc/507684/

Switzerland without food and without money, appealed to the Swiss Federal Tribunal (the country's highest judicial instance) for violation of their right to assistance, including food. They could not work, for they were not allowed a work permit, and, as refugees without papers, they could not leave the country. They had requested help from the regional authorities in the canton of Bern, but this was refused. They then went directly to the Federal Tribunal. The Tribunal for the first time recognized the right to minimal conditions of existence, including *"the guarantee of all the elementary human needs such as food, clothing and shelter"* in order to prevent *"a state of mendicancy unworthy of the human condition"*.[263] It decided that everyone present on Swiss territory had the right, at the least, to minimal conditions of existence in order to avoid being reduced to begging. This right is now recognized in the new constitution[264] as a basic right:

> *Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living.* (Art. 12)

2. At the Regional Level

In 2001, two NGOs[265] appealed to the ***African Commission on Human and Peoples' Rights*** regarding a violation of the right to food in ***Nigeria***. The complaint filed with the African Commission sought to defend the Ogoni people from the national petroleum company and the transnational corporation Shell. The two oil companies, with the government's complicity and with total impunity, were destroying the lands and water resources of the Ogonis. In this case and for the first time, the African Commission concluded that the

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263 ATF 121 I 367, 371, 373 V. = JT 1996 389. See also A. Auer, G. Malinverni, M. Hottelier, Droit constitutionnel suisse, (Bern: Staempfli, 2000), p. 685 – 690.

264 Adopted 18 April 1999.

265 Social and Economic Rights Action Center (Nigeria) and Center for Economic and Social Rights (USA).

Nigerian Government had the obligation to respect and protect the Ogonis' right to food, including vis-à-vis the national and transnational oil companies. In the Commission's view:

> *The minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. … The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves. The Nigerian government… is in violation of the right to food of the Ogonis.*[266]

The ***Inter-American Commission on Human Rights*** is often called upon to enforce the right to food through civil and political rights (see above). In 1990, a petition presented to the Commission in the name of the indigenous Huaorani people, living in the Oriente region of ***Ecuador***, charged that the oil production activities of both the national company Petro-Ecuador and Texaco were contaminating the water used by the population for drinking and cooking as well as the land that they farmed to feed themselves. In November 1994, following the publication of a report by the Center for Economic and Social Rights,[267] the Inter-American Commission undertook a visit to Ecuador. In its final report, in 1997, it concluded that access to information, to decision-making and to judicial redress (hence civil and political rights) had not been guaranteed to the Huaorani, and that oil-production activities in Ecuador were not sufficiently regulated to protect the indigenous populations.[268]

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[266] *155/96 The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria* (2001), §§ 68, 69. http://www1.umn.edu/humanrts/africa/comcases/155-96b.html

[267] *Rights violations in the Ecuadorian Amazon: the human consequences of oil development*, March 1994, https://www.cesr.org/rights-violations-ecuadorian-amazon-human-consequences-oil-development/

[268] *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/11.96, doc. 10 Rev.1, 24 April 1997. http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm

In 2018, indigenous Argentinian communities, under the Lhaka Honhat association, filed a compliant with the ***Inter-American Court of Human Rights*** against ***Argentina*** for violation of their rights by allowing Creole settlers to settle on their lands in the Salta province. The settlers were illegally harvesting wood, raising cattle, causing loss of biodiversity and impairing the indigenous peoples' traditional access to food and water. In its 6 February 2020 ruling, the Court concluded that there was a violation by Argentina of the right of 132 indigenous communities to food and to water under Article 26 of the Inter-American Convention in conjunction with Article 1.1.[269] The Court's decision was based on Article 75.22 of the Argentine constitution, which provides that international human rights norms ratified by Argentina (e.g. the ICESCR) have constitutional status and, consequently, the right to food, enshrined in this Covenant and other instruments, had constitutional validity.[270] In the Court's view, the State had failed to meet its obligations regarding the right to food by failing to police the activities of individuals and groups, resulting in violations of this right.[271]

3. At the International Level

In its 25 July 2019 decision, the ***Human Rights Committee*** ruled on a case opposing ***Paraguay*** and the Portillo Cáceres family,[272] who practiced peasant family agriculture in the Yerutí settlement (Curuguaty district in the department of Canindeyú), created in 1991 after the agrarian reform on land belonging to the State. The settlement is situated in one of the areas where industrial and intensive agriculture is practiced and is surrounded by former cattle

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269 *Corte interamericana de derechos humanos, caso comunidades indígenas miembros de la asociación Lhaka Honhat (nuestra tierra) vs. Argentina, Sentencia de 6 de febrero de 2020 (Fondo, Reparaciones y Costas)*, p. 120, § 3.

270 Ibid., § 214.

271 Ibid., §§ 215 à 221.

272 *Portillo Caceres v. Paraguay*, CCPR/C/126/D/2751/2016, §§ 2.2, 2.3, 7.4, 7.5, 7.8, 7.9, 9, 20 September 2019.

farms which, since around 2005, have been devoted to extensive mechanized GMO soybean farming. These farms spray on a wide scale, spreading toxic phytosanitary substances from tractors and small planes, in systematic violation of Paraguay's environmental regulations. These fumigations have resulted in the pollution of the settlement's lands and water resources, the death of fish and farm animals and the loss of crops and fruit trees, all sources of the inhabitants' food. They have also caused the death of Portillo Cáceres (26 years old) and the hospitalization of 22 members of the settlement.

Considering that there is an undeniable link between environmental protection and the fulfillment of human rights, and that environmental degradation has effects on the enjoyment of the right to life, the Committee reckoned that the massive fumigations with toxic phytosanitary products in the area in question constituted a threat to life for the authors. Thus the Committee concluded that there had been a violation of the right to life (Art. 6 of the Covenant).

Further, noting that Paraguay had not undertaken adequate policing of the illegal activities that were the source of the pollution, the Committee concluded that there had been a violation of the right to respect of private and family life and of the home of asylum seekers (Art. 17 of the Convention). Noting also that the environmental pollution that had caused their poisoning and the death of Mr. Portillo Cáceres had not been subject to a proper, adequate, impartial and diligent inquiry, the Committee concluded that there had been a violation of Article 2.3 (access to justice), in conjunction with Articles 6 and 17 of the Covenant.

Accordingly, the Committee ruled that "the State party is under an obligation to provide the authors with an effective remedy, which entails full reparation for the persons whose rights have been violated. The State party should therefore: (a) undertake an effective, thorough investigation into the events in question; (b) impose

criminal and administrative penalties on all the parties responsible for the events in the present case; (c) make full reparation, including adequate compensation, to the authors for the harm they have suffered. The State party is also under an obligation to take steps to prevent similar violations in the future."[273]

In a case concerning the prison conditions of a Greek detainee, the Human Rights Committee reminded ***Greece*** that a minimum standard must be respected regardless of the level of development of the State and that this includes providing a diet whose nutritional value is adequate to guarantee good health and physical strength.[274]

Troubled by the negative effects on the traditional way of life of the groups concerned, including the indigenous peoples, produced by the economic development and natural resources projects authorized by ***Cameroon***, the ***CESCR*** requested that Cameroon "ensure that communities, including indigenous communities, that are affected by activities related to economic development or to the exploitation of natural resources on their territories are consulted, receive compensation for damages or losses and receive a share of the profits from those activities." The Committee also requested that the country adopt "a legislative and institutional framework and a comprehensive strategy for guaranteeing the right to adequate food and combating hunger and chronic malnutrition, particularly in rural areas and in the Far North Region". It further requested the government to support the productivity of small producers and to "consider mounting campaigns to raise awareness about the importance of preventing the use of agricultural pesticides and chemicals that are hazardous to people's health and to disseminate agroecological practices", while reinforcing efforts to combat social inequality and poverty.[275]

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273 Ibid., § 9.

274 CCPR/C/135/D/3740/2020, 26 January 2023, § 8.4.

275 CESCR, Concluding observations on the fourth periodic report of Cameroon, E/C.12/CMR/CO/4, 25 March 2019, §§ 17b, 51a, 51c.

In their reports, the ***Special Rapporteurs on the Right to Food*** have studied a wide range of topics. For example, they have examined the justiciability of the right to food; food sovereignty; the resistance of traditional fishers; the spread of intensive and industrial fishing; inequality in trade liberalization; agrarian reform; seeds; food systems; the harmful effects of pesticides; agroecology; the rights of peasants; agricultural workers' right to food; large-scale acquisition and leasing of land; the impact of biofuels on the right to food; the necessary control of the activity of transnational corporations.[276]

Among the recommendations addressed to States following their field missions, we can mention, among others, the acceleration without conditions of the agrarian reform in ***Brazil***; cessation of discrimination against women, in particular in access to land, in ***Bangladesh***; the adoption of agroecological practices in ***Morocco***; and the recognition of the status of unrecognized indigenous peoples in the law on First Nations in ***Canada*** in order to allow all indigenous peoples to have access to land and water rights.[277]

In the report on her mission to ***Venezuela,***[278] the ***Special Rapporteur on Unilateral Measures of Coercion*** noted the "devastating effect on the entire population" of the unilateral sanctions imposed by several States and international organizations. She emphasized that, since 2018, the United States sanctions have been targeting the food sector. For a country that imports some 75% of the food it consumes, this is a vital sector, for it is impossible for Venezuela to "to buy essential technological equipment and supplies for the repair and maintenance of public electricity, gas, water, transport, telephone and communication systems, and for schools,

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276 All the thematic reports are available on https://www.ohchr.org/en/special-procedures/sr-food/annual-thematic-reports

277 All the mission reports are available on https://www.ohchr.org/en/special-procedures/sr-food/country-visits

278 A/HRC/48/59/Add.2, 4 October 2021.

hospitals and other public institutions, undermining the enjoyment and exercise of the most fundamental rights to life".[279] This undermines the enjoyment of human rights such as the rights to life, to food, to water, to health, to adequate housing and to education.[280] In the Special Rapporteur's view, these sanctions, "imposed mostly in the name of human rights, democracy and the rule of law", must be lifted, for they undermine these very principles, values and norms.[281]

Food: a Central Element for Sustainable Development[282]

> (...) In the face of the COVID-19 pandemic, it is particularly disturbing to notice the worsening of the food crisis throughout the world. According to FAO projections, most of the indicators of hunger and malnutrition show a deterioration of the situation as a result of the international health crisis. (…) Regarding "moderate/severe" hunger and malnutrition, the figures show more than 2 billion persons. Paradoxically, the majority of persons suffering from hunger are food producer and workers in rural areas. This situation is the result of the architecture and the functioning of current food systems, subjected to the whims and interests of major transnational agribusiness corporations, to the detriment of the family peasantry and rural communities.
>
> (…) Preceding food crises, and in particular that of 2008, have shown that agribusiness, and the business sector in general, do not represent a way forward to solve hunger and malnutrition, nor to achieving the SDGs. On the contrary, they are often at the origin of the problem: they promote agricultural systems oriented

279 Ibid., § 28.

280 Ibid.

281 Ibid, p. 1.***

282 Edited extracts from the written statement of CETIM, presented to the *High Level Political Forum 2021 in the framework of the ECOSOC high-level segment (6 – 16 July 2021).*

> to exports that undermine the prerogatives of subsistence farming, thus increasing malnutrition among small-scale food producers; they advocate monoculture systems, which harm biodiversity, soil quality, food and nutritive inputs of local populations; they encourage stock market speculation on agricultural products and natural resources and cause financial bubbles and dramatic food crises for entire populations, while filling shareholders' pockets (…)
>
> The theme of the ECOSOC High Level Political Forum (2001) indicates a willingness to contribute to orienting our societies to the construction of an inclusive way forward to the realization of Agenda 2030 and sustainable development models , especially in the face of the international health crisis. For us, the construction of this road means, imperatively, the promotion of resilient, sustainable and egalitarian agricultural systems based on food sovereignty and the promotion and the respect of peasants' rights.[283] To attain these goals, it is essential that States invest in agriculture and protect rural areas and family peasantry, while encouraging multilateral international cooperation. (…)

[283] The rights of peasants are enshrined in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, A/RES/73/165, 21 January 2019. For further information: Coline Hubert, *The UN Declaration on the Rights of Peasants* (Geneva: CETIM, 2019).

CHAPTER 2

THE RIGHT TO WATER

Only 3% of the earth's water is fresh water, 99% of which is stored in glaciers or deep in the earth. Thus, humanity has access to only the 1% of fresh water resources found on the surface, bearing in mind that the total quantity of the planet's water neither increases nor decreases and that water has an uninterrupted natural cycle.[284] Further, water is unequally distributed across the globe: abundant in some regions, it is extremely rare in arid areas.

In our times, drinking water has become increasingly scarce and more and more polluted owing to production methods (in industry and intensive industrial agriculture, in particular) and to development (infrastructure and tourism among other things) carried on throughout the world. Pollution, which is one of the main factors behind the scarcity of potable water, is essentially due to industrial activities. For example, it takes around 500 liters of water to manufacture 1 kg of paper, and 300 to 600 liters of water for 1 kg of steel.[285]

The wide-scale use of highly polluting chemical products in industry (automobile and textile, among others), the construction of gigantic dams on watercourses, transportation (of goods and persons), industrial-scale agriculture and animal production, the information technology sector,[286] not to mention armed conflicts, not

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[284] *L'eau, patrimoine commun de l'humanité*, Alternative Sud Publications, CETRI, February 2002.

[285] https://www.eaufrance.fr/chiffres-cles/volume-deau-necessaire-pour-fabriquer-1-kg-de-papier

[286] For example, the Microsoft storage center in the Netherlands used 84 million liters of water in 2021 while the country is confronted with a water shortage: https://www.clubic.com/pro/entreprises/microsoft/actualite-434481-en-pleine-

only constitute significant sources of pollution, but also have as consequences environmental destruction, proliferation of disease and population displacement affecting millions. Privatization, waste and mismanagement of water constitute other obstacles to this precious natural resource for billions of persons and for the peasantry devoted to subsistence farming.

Indeed, according the United Nations: "2 billion persons live in countries suffering from water stress";[287] more than half of the world's population, 4.2 billion persons, lack reliably managed sanitation services; and "80% of wastewater flows back into the ecosystem without being treated or reused".[288] Use of a contaminated drinking water source and the lack of sanitation trigger the transmission of illnesses such as cholera, diarrhea, dysentery, hepatitis A, typhoid and polio.[289]

This is a central problem for humanity, for water is essential for life. It should be managed rationally and parsimoniously by the community in order to preserve this heritage for current and future generations. Yet, water is already a source of armed conflict, or a potential source of conflict, in certain regions of the world (between Israel and both Syria and the Occupied Palestinian Territory; between Turkey[290] and Syria, Iraq, Greece and Cyprus; between

penurie-d-eau-les-pays-bas-en-decouvrent-la-consommation-dantesque-des-data-centers-de-microsoft.html

287 https://www.who.int/news-room/fact-sheets/detail/drinking-water

288 https://www.un.org/en/global-issues/water

289 https://www.who.int/news-room/fact-sheets/detail/drinking-water

290 Since the 1970s, Turkey has built several dozen dams on the Tigris and Euphrates Rivers, which cross Syria and Iraq. Besides the damage to the environment and the major population displacements caused by these dams, they have been used as weapons against the neighboring countries. Although Turkey has committed to supplying them with a sufficient flow of water (minimum 500 m^3 per second), it does not always respect its commitments (see inter alia https://www.radiofrance.fr/franceculture/la-bataille-de-l-eau-entre-la-turquie-et-l-irak-4712552 and https://orientxxi.info/magazine/la-turquie-mene-une-guerre-de-l-eau-en-syrie,5084). CETIM has recently raised the matter in the Human

Ethiopia and both Egypt and Sudan; between China and both India and Bangladesh; between Laos and both Vietnam and Cambodia…).

Already in 1972, the United Nations was sounding the alarm on the dangers of environmental destruction, organizing the first United Nations conference on the environment and water, which resulted in the creation of the United Nations Environment Programme (UNEP). Similarly, although the United Nations General Assembly proclaimed 22 March "World Water Day" in 1993 and numerous treaties enshrine water as a human right, the situation remains worrying, and it is rare that it is approached from the perspective of human rights.

A. Definition and Content of the Right to Water

Several international human rights treaties refer, implicitly or explicitly, to the right to water.

During the ***United Nations Water Conference***, held in Mar del Plata in 1977, States proclaimed that:

> *all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantity and of a quality equal to their basic needs.*[291]

To cut short a debate that certain parties wished to launch over whether water is a human right or not, the ***United Nations General Assembly***, at the initiative of Bolivia, recognized both water and sanitation as human rights:

Rights Council: https://www.cetim.ch/violation-of-the-right-to-water-in-northern-and-eastern-syria/.

[291] Report of the United Nations Water Conference, Mar del Plata, 14- 25 March 1977, E/CONF.70/29, Part One, Chapter I, Resolution II, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N77/114/97/PDF/N7711497.pdf?OpenElement

> *the right to safe and clean drinking water and sanitation [is] a human right that is essential for the full enjoyment of life and all human rights.*[292]

The ***Universal Declaration of Human Rights*** stipulates that:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services… (Art. 25.1)*

This is an implicit recognition of the right to water, given that a standard of living adequate for one's health and well-being is inconceivable without water. The same principle holds for Article 11 of the ***ICESCR***.

Thus, in its General Comment No. 15, the ***CESCR*** considered it necessary to define the contours of this right:

> *The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights… The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.*[293]

The Committee stipulates that everyone has the right to water that is healthy and of acceptable quality, available in sufficient quantity, and regularly, physically and economically accessible (at an affordable price) and without discrimination (§ 12).

The Committee has also defined personal and domestic needs as "drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene" (§ 12.a).

In the Committee's view, water is necessary to realize a range of ESCR, such as "to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for

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[292] Resolution A/RES/64/292, 3 August 2010.

[293] CESCR, *General Comment No. 15*, E/C.12/2002/11, 20 January 2003, §§ 1, 2.

securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses" (§ 6).

The Committee deems it fundamental to guarantee that "everyone has access to adequate sanitation (…) for human dignity and privacy", for it is "one of the principal mechanisms for protecting the quality of drinking water supplies and resources" (§29).

Considering that "Water is a limited natural resource and a public good fundamental for life" (§ 1), the Committee asserts:

> *Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations. (§11)*

For the ***Special Rapporteur on the Rights to Water and Sanitation***,[294] the link between the right to water and sanitation[295] is obvious, and sanitation is an integral part of a great number of other human rights such as the right to a decent standard of living, adequate housing, health, education, work, life, physical safety, protection from inhuman and degrading treatment, gender equality and protection from discrimination.[296]

In its directives on the realization of the right to drinking water and sanitation, the former ***Sub-Commission on the Promotion and***

[294] Created in 2009, this mandate, initially called the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, was renamed in 2011. It has been held by Catarina de Albuquerque (2009-2014), Léo Heller (2015-2020) and Pedro Arrojo-Agudo (since September 2020).

[295] According to the Special Rapporteur: "The connection between water and sanitation is clear: without proper sanitation, human excreta contaminate drinking water sources, affecting water quality and leading to disastrous health consequences." (A/HRC/12/24, 1 July 2009, §§ 33, 63)

[296] Ibid., § 13.

Protection of Human Rights stipulated in 2005, on the one hand that "everyone has the right to a sufficient quantity of clean water for personal and domestic uses", and, on the other hand, "everyone has the right to have access to adequate and safe sanitation that is conducive to the protection of public health and the environment".[297] These directives require that sanitation services be physically accessible "within, or in the immediate vicinity of the household, educational institution, workplace or health institution", culturally acceptable, sufficient and affordable (§1.3).

B. Pertinent International and Regional Norms

1. At the International Level

The ***Convention on the Elimination of All Forms of Discrimination against Women*** explicitly recognizes the right to "enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications." (Art. 14 h).

The ***Convention on the Rights of the Child*** requires that States take measures to, inter alia, "combat disease and malnutrition, including within the framework of primary health care, through, inter alia, [...] the provision of adequate nutritious foods and clean drinking water, (Art. 24.2.c)

The ***Convention on the Rights of Persons with Disabilities***, for its part, requires that States ensure "equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs." (Art. 28.2.a)

ILO Convention No. 161 on Occupational Health Services (1985) requires, "without prejudice to the responsibility of each employer for the health and safety of the workers in his employment, […]

[297] E/CN.4/Sub.2/2005/25, 11 July 2005, §§ 1.1, 1.2.

surveillance of the factors in the working environment and working practices which may affect workers' health, including sanitary installations, canteens and housing where these facilities are provided by the employer."(Art. 5).

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** recognizes not only the right to clean drinking water and to sanitation, but also the right of peasants to grow crops, raise livestock and fish:

> *Peasants and other people working in rural areas have the right to water for personal and domestic use, farming, fishing and livestock keeping and to securing other water-related livelihoods, ensuring the conservation, restoration and sustainable use of water. They have the right to equitable access to water and water management systems, and to be free from arbitrary disconnections or the contamination of water supplies. (Art. 21.2)*

It must be noted that Article 6 (right to life) of the International Covenant on Civil and Political Rights is cited by the human rights protection mechanisms to defend the right to water. (See also the chapter on the right to food.)

2. At the Regional Level

The ***African Charter on the Rights and Welfare of the Child*** recognizes that "every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health" and requires States "to ensure the provision of adequate nutrition and safe drinking water." (Art. 14).

States parties to the ***Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*** are required to provide women the right to healthy and adequate food. In line with this, they must take necessary measures to ensure that women have access to clean drinking water, to domestic sources of energy, to land and to the means of food production (Art. 15).

The ***African Charter on Human and Peoples' Rights*** does not explicitly provide for the right to water. Its Articles 16 (right to health) and 22 (economic, social and cultural development) are often used to deal with the right to water. (See below, the example of Sudan.)

C. States' Specific Obligations

As is the case with other human rights, States are obliged to respect the right to water, to protect it and to implement it. (See also the chapter on the right to food.)

In its General Comment No. 15 on the right to water, the ***CESCR*** has listed States' obligations in this area. According to the Committee, States have "immediate obligations in relation to the right to water (…). Such steps must be deliberate, concrete and targeted towards the full realization of the right to water" (§ 17). They must be "feasible and practicable" since all States "exercise control over a broad range of resources, including water, technology, financial resources and international assistance" (§ 18).

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

The obligation to ***protect*** the right to water means that States must "prevent third parties from interfering in any way with the

enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems." (§23)

The obligation to ***implement*** comprises the obligations to *facilitate*, *promote* and *provide* (§25). The obligation to *promote* requires that States "take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage". States are also obliged to fulfill (provide) the right when individuals or a group, for reasons beyond their control, are unable to realize that right themselves by the means at their disposal. The "one million wells" program in Brazil, which consists of stocking rain water in cisterns in the semi-arid regions of Brazil is an example of the implementation of this obligation.[298]

In its *General Comment No. 15*, the Committee further specifies: "States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children." (§ 29)

In the view of the ***Special Rapporteur on the Rights to Water and Sanitation***, "international human rights law requires States to ensure access to sanitation that is safe, hygienic, secure, affordable, socially and culturally acceptable, provides privacy and ensures dignity in a non-discriminatory manner."[299]

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[298] Report of the Special Rapporteur on the Right to Food on the mission to Brazil. E/CN.4/2003/54/Add.1, 3 January 2003, § 39.

[299] A/HRC/12/24, 1 July 2009, § 81.

As for the ***Committee on the Right of the Child***, it declares that States "have a responsibility to ensure access to clean drinking water, adequate sanitation, appropriate immunization, good nutrition and medical services, [...]".[300]

1. States' Obligations regarding the Intervention of Third Parties

As emphasized above, States have the obligation to prevent third parties from impeding the exercise of the right to water. "Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance."[301]

2. International Cooperation

According to the CESCR, depending on the resources that they have at their disposal, "States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required (…) The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard."[302]

As well, States must respect the exercise of the right to water in other countries. For example, they must take measures to prevent their own nationals or business enterprises registered on their territory from violating the right to water of individuals and

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300 Committee on the Rights of the Child, *General Comment No. 7*, CRC/C/GC/7/Rev.1, 20 September 2006, § 27.a.

301 CESCR, *General Comment No. 15*, E/C.12/2002/11, 20 January 2003, § 24.

302 Ibid., §34.

communities in other countries. International cooperation demands that States "refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries".[303]

The use of transboundary watercourses is very often a source of conflicts. As emphasized by the United Nations Special Rapporteur on the Right to Food in his mission reports on Ethiopia, India and Bangladesh, in the use of transboundary watercourses States must give priority to the satisfaction of the basic human needs of the populations depending on the watercourses, particularly with regard to drinking water and the water necessary for subsistence agriculture.[304]

3. Obligations of Member States of International Financial Institutions

According to the CESCR, States parties to the ICESCR that are members of international financial institutions, especially the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to water in these institutions' loan policies, credit agreements and other international initiatives.[305]

D. Examples of Implementation

1. At the National Level

In ***France***, a business enterprise considered that its contractual and business freedom was impeded by a provision of the law on social action and families (Art. L. 115-3), which prohibited throughout the year water suppliers from cutting off service owing to non-payment of bills, without allowing for compensation. The appeals court requested an opinion from the French Constitutional Council (by

303 Ibid., §31.

304 https://www.ohchr.org/en/special-procedures/sr-food/country-visits

305 CESCR, General Comment No. 15, E/C.12/2002/11, 20 January 2003, § 36.

means of a priority constitutionality question). On 29 May 2015, the court recalled that this law aimed "to ensure that nobody in a situation of distress be deprived of water" at any time throughout the year.[306] Further, the Constitutional Council considered that access to water corresponds to an essential human need and that a law guaranteeing it furthered the constitutional principle that everyone should have adequate housing. Thus, it concluded that this provision (Art. L.115-3) is in conformity with the constitution.[307]

One of the biggest health scandals in the ***United States*** is still running its course: the lead contamination of the drinking water of the city of Flint, Michigan. In 2014, for financial reasons, the governor had changed the source of the city's water supply from Lake Huron to a local river. For a year and a half, the polluted, untreated river water corroded the city's water pipes and exposed its inhabitants to high levels of lead, causing cases of lead poisoning (18,000 to 20,000 children were exposed) as well as legionnaire's disease, which caused 12 deaths. After several court cases, an agreement was reached in 2017.[308] Under the settlement, the State of Michigan must pay 600 million dollars to repair the injuries caused to all the children exposed to lead, to every adult harmed as well as to all those who had paid their water bills. Further, the City of Flint, under the agreement, was ordered to replace the water pipes likely to contain lead before January 2020. This work is still under way, and in February 2023 U.S. District Court Judge David M. Lawson ordered that the City finish the work by August 2023.[309] It is worth noting that

306 Conseil Constitutionnel, Decision No. 2015-470 QPC of 29 May 2015, § 7: https://www.conseil-constitutionnel.fr/decision/2015/2015470QPC.htm

307 Ibid., § 17.

308 *Flint Drinking Water Lawsuit Settlement Agreement*, 23 March 2017, https://www.documentcloud.org/documents/3534685-Flint-Drinking-Water-Lawsuit-Settlement

309 See, inter alia, K. House, «U.S. Judge: Flint has 5 months to finish long-overdue lead pipe replacement», in *Bridge Michigan* (Online), 28 February 2023, https://www.bridgemi.com/michigan-environment-watch/us-judge-flint-has-5-

the criminal proceedings regarding the responsibility of the authorities are still under way, and that recently the criminal prosecution against almost all the accused was dropped for procedural reasons.[310] The Michigan Attorney General nonetheless intends to appeal. To be continued…

In the Andes mountain chain, between ***Chile*** and Argentina, the Toro I, Toro II and Esperanza glaciers constitute major water reserves, feeding the catchment areas and all the watercourses of the region and of the indigenous communities. However, open sky mining (gold, silver and copper) at Pascua Lama begun in 2000 has caused significant damage. The exploratory phase of the project alone has destroyed more than 62% of the Toro I glacier, 71% of the Toro II glacier, and 70% Esperanza glacier. Today, the damage is estimated at more than 90%.[311] The Diaguitas indigenous communities in the Atacama region of Chile appealed to the courts in Copiapó to assert their right to life, violated by the pollution of water resources caused by the mining company Compañía Minera Nevada SpA (an affiliate of the Canadian company Barrick Gold). In its 25 September 2013 ruling, the Supreme Court ordered the suspension of the mining project until all measures had been taken to ensure the proper management of the water and a monitoring system for the implemented measures had been set up.[312] On 18 January 2018, the Chilean Oversight Authority for the Environment (Superintendencia del medio-ambiente),[313] after an in-depth inquiry, ordered the definitive closing of Pascua Lama site and imposed a fine of some US$ 7 million on the Compañía Minera Nevada SpA for serious and

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months-finish-long-overdue-lead-pipe-replacement

310 Ruling of 4 October 2022, Judge E. A. Kelly, 7th District Court of Genessee County, Michigan, https://www.documentcloud.org/documents/23118349-judge-kelly-order-dismissing-flint-water-cases

311 https://www.glaciareschilenos.org/notas/cronologia-de-un-desastre-pascua-lama/

312 § I.- 1: https://www.escr-net.org/sites/default/files/Decision%20-%20Corte%20Suprema_0.pdf

313 https://portal.sma.gob.cl/index.php/que-es-la-sma/

repeated violations of environmental norms.[314] The Chilean Environmental Tribunal ruled in favor of shutting down the project in 2018 then in 2020. On 14 July 2022, the Supreme Court finally drew the case to a close by rejecting the appeals of the mining and agriculture businesses (la Compañía Minera Nevada SpA y Agrícola Dos Hermanos y Agrícola Santa Mónica) and by confirming the legality of the definitive closing of the site as well as the fines.[315]

Some residents in rural areas and rural workers in ***South Africa*** had no proper access to water nor to proper sanitation. The residents had access to only one common faucet 500 meters distant. The workers were living in decrepit lodgings on a farm with no sanitation, the owner having opposed the installation of toilets, sending the workers to use those at a sugar plantation. The trash was not collected, and there were two faucets of drinking water for 60 workers. In 2015, the plaintiffs had asked the owner as well as the municipal authorities and the government to provide access to water and sanitation. It was only in 2019 that the South African High Court's Kwazulu-Natal Pietermaritzburg Division was entrusted with the case. It concluded that the municipal authorities had violated the constitutional rights (notably Article 27(1)(b) on the right to sufficient food and water) of the residents and rural workers by failing to provide sufficient access to water and sanitation.[316] Accordingly, it ordered the authorities to provide access to water, to sanitation and to trash collection for the residents and rural workers. The Court also ordered them to install enough water connections to supply a minimum of 25 liters of potable water per person per day or

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314 https://portal.sma.gob.cl/index.php/2018/01/18/sma-sanciona-a-pascua-lama-2018/

315 Supreme Court of Justice of the Republic of Chile, Judgment Ruling No. 127.275-2020, https://www.diarioconstitucional.cl/2022/07/24/corte-suprema-confirma-las-sanciones-aplicadas-por-la-sma-al-proyecto-pascua-lama/

316 High Court of Kwazulu-Natal, Pietermaritzburg, South Africa, 29 July 2019, Case No. 11340/2017P, ZAKZPHC 52; [2019] 4 All SA 469 (KZP), §86, http://www.saflii.org/za/cases/ZAKZPHC/2019/52.html

six kiloliters per household per month, and to ensure that they supplied a minimum flow of 10 liters of water per minute through connections situated at less than 200 meters from the plaintiffs' place of residence.[317]

The transnational corporations Pepsi-Cola and Coca-Cola owned 90 bottling plants in Kerala, ***India,*** and pumped from the region's water table to make their products. The water level had dropped drastically, from 45 to 150 meters in depth, as these two companies were each illegally extracting around 1.5 million liters of pure water a day. This caused serious problems of access to drinking water for the neighboring populations. Further, the toxic waste given by the companies as fertilizer to local farmers was also a source of pollution.[318] After several court cases, the matter reached the Indian Supreme Court in July 2017, where Coca-Cola announced that it would not resume activities at the Plachimada plant (which had been intermittently closed since 2004).[319] However, even now, the village's inhabitants are dependent on the neighboring village's water resources. They have not been compensated for the degradation of their environment nor for the violation of their rights.[320] Coca-Cola has also closed its pumping stations in other regions of India suffering from water stress, such as Varanasi in Uttar Pradesh and Jaipur in Rajasthan (after either having exhausted all the available water or having been ordered to close down by the Indian authorities). However, the question of responsibility, compensation and reparation of the damage caused to the environment and to the

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317 Ibid.

318 See E. David & G. Lefevre, *Juger les multinationales* (Brussels: éd. Mardaga-GRIP, 2015), p. 52; Shiva, "Les femmes du Kerala contre Coca-Cola, Le monde diplomatique, March 2005.

319 G. Raghunandan, "A Look at the Legal Issues Plachimada's Struggle for Water Against Coca-Cola Has Brought Up", in *The Wire* (Online), 20 August 2017, https://thewire.in/law/coca-cola-plachimada-kerala-water

320 https://foeasiapacific.org/2022/11/12/prosecute-coca-cola-company-and-compensate-the-people-of-plachimada/

populations remain unresolved. On 25 February 2022, the National Green Tribunal ordered several of Coca-Cola's bottling plants in Uttar Pradesh (Moon Beverages Ltd, Varun Beverages Ltd) to pay a fine of almost US$ 2 million for pumping out ground water in regions suffering from water stress.[321] Nonetheless, the Indian Supreme Court suspended the execution of this judgment on 19 May 2022 following an appeal by Moon Beverages.[322] The Court will soon rule on this case.

Finally, the Uruguayans, enraged by abusive privatizations of the water sector, through a referendum that passed with 65% of the votes, enshrined in their constitution (Art. 47) access to water as a fundamental right whose realization may not be ensured by private entities.[323] However, the recent Arazati project launched by the current government is denounced by REDES (Amigos de la tierra Uruguay) as an attempt to reprivatize water in the country.[324]

2. At the Regional Level

The indigenous Xákmok Kásek, from the Chaco region of ***Paraguay***, have fought since the 1990s for the restitution of their traditional lands, divided and sold off by the State then set up as protected national reserves. In 2008, the Inter-American Commission

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321 See National Green Tribunal, Principal Bench New Delhi, Judgment 25 February 2022, Original Application No. 69/2020, and Appeal No. 45/2020, https://greentribunal.gov.in/gen_pdf_test.php?filepath=L25ndF9kb2N1bWVudHMvbmd0L2Nhc2Vkb2MvanVkZ2VtZW50cy9ERUxISS8yMDIyLTAyLTI1LzE2NDU3ODM2MjMyMzMwNzk4NDQ2MjE4YWE0NzhlNjY3LnBkZg==

322 See Supreme Court of India, Section XVII, Moon Beverages Limited vs Sushil Bhatt on 19 May, 2022, Civil Appeal No. 2901/2022, https://main.sci.gov.in/supremecourt/2022/10220/10220_2022_5_2_35996_Order_19-May-2022.pdf

323 Information Bulletin of CETIM No. 22, https://www.cetim.ch/information-bulletin/

324 https://www.redes.org.uy/2022/11/22/proyecto-arazati-avanza-en-privatizacion-del-agua-en-flagrante-violacion-de-nuestra-constitucion-nacional/.

on Human Rights ruled in favor of this people, then referred the case to the ***Inter-American Court of Human Rights*** because Paraguay had not followed its recommendations. The Court ruled on 24 August 2010,[325] noting that the Xákmok Kásek people had no access to potable water in the camp to which they were relegated (outside their ancestral lands) and that the government had not provided water in sufficient quantity and quality in conformity with international standards.[326] The Court considered that the Xákmok Kásek people's situation of extreme vulnerability was due, inter alia, to the limited presence of public institutions obliged to supply products and services to members of the community, in particular food, water, medical care and education, and to the predominance of a vision of prosperity that accords greater protection to private property owners than to the indigenous peoples.[327] Thus, for the Court, it was the very "physical existence" of this people that was threatened. Accordingly, it concluded, in particular, that the right to life of the plaintiffs had been violated, and ordered as compensation the restitution of their ancestral lands to this people and the creation of a fund to which US$ 700,000 would be allotted to provide services such as potable water and sanitation.[328]

Two Sudanese human rights protection organizations appealed to the ***African Commission on Human Rights*** regarding systematic violations of the human rights of indigenous black tribes in Darfur (Fur, Marsalit and Zaghawa) by ***Sudan*** and the militias supported by the Sudanese government. In its ruling of 27 May 2009, the Commission declared that poisoning water sources such as wells, just like the destruction of houses, farms and livestock, had exposed

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325 *Case of the Xákmok Kásek indigenous community v. Paraguay*, Judgment of August 24, 2010, https://www.corteidh.or.cr/docs/casos/articulos/seriec_214_ing.pdf

326 The government had supplied 2.17 liters of water per person per day, whereas the standard minimum is 7.5 liters per person per day, § 195 of the judgment

327 Ibid., § 273.

328 Ibid., § 323.

the plaintiffs to serious health risks and constituted a violation of Article 16 of the Charter.[329] The Commission required, inter alia, that Sudan consolidate and finalize the peace accords as well as rehabilitate elements of the economic and social infrastructure such as water services, and set up a national reconciliation forum to settle the long-term sources of the conflict and resolve the disputes over rights to land, pasturing and water.[330]

3. At the International Level

CEDAW received an appeal in a case concerning mothers of Roma origin in ***Northern Macedonia***[331]. These women lived in an informal camping ground which the authorities destroyed without notice on 1 August 2016, along with the area's only water source. Worse, the Macedonian authorities made no provision for any other lodging. In its 24 February 2020 ruling, the CEDAW found that the State had violated the plaintiffs' rights under Articles 2, 12 and 14 of the Convention on the Elimination of All Form of Discrimination against Women, and ruled that the government should provide them with adequate housing, access to clean water and sufficient food as well immediate access to affordable health services.[332]

In its Concluding Observations regarding the initial report of ***Guinea***, the ***CESCR***, noting the negative effect of extractive mining activities on the local communities' environment and health, requested inter alia that the State guarantee the quality of water sources, including by bringing to account the business enterprises and individuals implicated in the mining that was causing the

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329 *Sudan Human Rights Organization v. Sudan*, Decision, Comm. 279/03; 296/05 (ACmHPR, May 27, 2009), §§ 207 to 212: http://www.worldcourts.com/achpr/eng/decisions/2009.05.27_SHRO_v_Sudan.htm

330 Ibid., §§ 225 to 229.

331 *L.A. et al (represented by counsel, European Roma Rights Centre) v. North Macedonia*, CEDAW/C/75/D/110/2016, 12 March 2020.

332 Ibid., § 9.8.a)ii).

pollution of the water sources.[333] Concerned that a great number of persons were suffering from anemia or remained confronted with food insecurity, and that access to clean drinking water and sanitation remained a substantial problem, especially in rural areas, the Committee further requested Guinea to take measures to ensure access to potable water and sanitation throughout the entire country, in conformity with the United Nations Declaration on the Rights of Peasants.[334] Concerned also by the limited access to water and to sanitation in schools, it requested that Guinea ensure that all schools have adequate water and sanitation systems, in particular separate sanitation facilities for girls and boys.[335]

Concerned by information about the corruption of agents of ***Benin***'s Société nationale des eaux (the national water company) and deficient water supply services to villages, preventing the enjoyment of the right to water, the ***CESCR*** requested that Benin: 1. revise current procedures so as to reduce the risks of corruption linked to the provision of services such as connection to the water system, subscription to the promotional connection program and the repair of system breakdowns and the restoration of the water supply after suspension for failure to pay bills; 2. ensure that all households be able to meet their water needs and avoid cuts to service owing to non-payment of bills; 3. facilitate the reporting of corrupt practices by informing users, in the national languages, of the costs of services and of the complaint mechanisms.[336]

In its concluding observations on ***Sri Lanka***, deeply concerned by the resettlement conditions of displaced persons, who were often deprived of adequate housing, access to water and sanitation and the means of subsistence, the ***CESCR*** requested that the government

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333 E/C.12/GIN/CO/1, 30 March 2020, §§ 16, 17.

334 Ibid., §§ 39, 40.

335 Ibid., §§ 47.e, 48.e.

336 Concluding Observations on the Third Periodic Report of Benin, E/C.12/BEN/CO/3, 27 March 2020, §§ 37, 38.

restore to the displaced persons the housing, the lands or the property of which they had been arbitrarily or illegally dispossessed and set up at the local level appropriate mechanisms to settle disputes over land and property and grant compensation to land owners whose land were occupied.[337]

During the first years of the mandate, the ***Special Rapporteur on the Rights to Water and Sanitation*** pleaded for the recognition of sanitation as a distinct right, arguing that human rights obligations are indisputably linked to sanitation, for it is inseparably linked to the enjoyment of a great number of other human rights.[338]

In reporting, the Special Rapporteur studied various aspects of the right to water. Among them, one might mention the following: obligations of States and non-State actors in the area of the rights to water and to sanitation; the impact of water pollution on the realization of human rights and the interface of access to sanitation and the treatment of wastewater; access to water and sanitation at an affordable price: international cooperation in service to development in the water and sanitation sector; the right to water and sanitation of displaced persons, refugees, asylum seekers and migrants; the impacts of megaprojects on the right to drinking water and sanitation; the impacts of the commodification and financialization of water on the right to drinking water and sanitation; the impacts of climate disruption on the right to water and sanitation of vulnerable people; indigenous peoples' right to potable water and sanitation; the realization by impoverished rural communities of the right to clean water and sanitation.

With regard to the impact of the commodification and financialization of water on the right to drinking water and

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337 Concluding Observations on Sri Lanka, E/C.12/LKA/CO/2-4, 9 December 2010, § 29.

338 Annual Report presented to the 12th session of the Human Rights Council, A/HRC/12/24, 1 July 2009.

sanitation, the Special Rapporteur points out that water "is a public good, but the commodification of water use rights is leading to the *de facto* progressive private appropriation of water through the management of it as if it belonged to those who received only the right to use it, weakening the rules and priorities established in the concession systems (i.e., legal framework for allocating water use licenses). This development puts at risk the exercise of human rights, especially for those living in poverty, as well as the sustainability of aquatic ecosystems."[339]

Concerning water scarcity due to the climate crisis, among other factors, the Special Rapporteur suggests that "water scarcity be addressed effectively through the practice of democratic water governance from a human rights-based approach and the implementation of climate change adaptation strategies instead of promoting commodification and financial speculation with water."[340]

In Follow-Up Observations (2020) after the mission to ***Mexico*** in 2017, the Special Rapporteur requested the Mexican government, inter alia, to urgently carry out independent research on the environmental and health impacts of development projects, industrial and commercial activities and the intensive use of pesticides and on the pollution or overuse of water sources, especially when these water sources are used by one or several communities; to reform the three-level decentralized water and sanitation management system with a view to reinforcing State and federal government support and financing of municipal services; to ensure universal access to water and sanitation for marginalized populations living in the most vulnerable conditions, especially the indigenous and rural populations, the homeless and urban populations.[341]

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339 Cf. A/76/159, 16 August 2021, §9.

340 Idem, §11.

341 A/HRC/45/10/Add.1, 27 August 2020.

Following his mission to ***Malaysia*** in 2018, the Special Rapporteur was concerned that certain groups still did not enjoy their rights to water and to sanitation. As a remedy, he suggested measures oriented first and foremost to the "socially and economically marginalized, such as: (a) the Orang Asli indigenous peoples; (b) those living in rural areas; (c) those affected by megaprojects; (d) those living in informal settlements; (e) undocumented children in alternative educational facilities; (f) refugees and asylum seekers; (g) prisoners and detainees; and (h) transgender and gender non-conforming persons."[342]

After his mission to ***Jordan*** (2014), noting that this country suffers from a water shortage, the Special Rapporteur opined that the "water and sanitation services can be made sustainable if personal and domestic uses are clearly prioritized, water losses are addressed and the tariff system is revised to ensure that subsidies actually benefit the poor."[343]

4. Interstate Litigation

In the context of their conflicts regarding water resources such as waterways in maritime areas, States generally turn to the International Court of Justice or the International Tribunal for the Law of the Sea to settle their disputes.

In 2006, ***Argentina*** appealed to the ***International Court of Justice*** (ICJ) in a case against ***Uruguay***, accusing the latter of having authorized the construction of two paper manufacturing plants on the Uruguay River without consulting or informing the Uruguay River Administrative Commission (CARU), in violation of provisions in the 1987 Uruguay River Statute. In 2010, the Court found Uruguay guilty of violating the 1987 Statute – in particular its obligation of prevention – for not having observed the information and

342 A/HRC/42/47/Add.2, 8 July 2019.
343 A/HRC/27/55/Add.2, 5 August 2014, §62.

consultation procedure. In its ruling, the Court emphasized the procedural dimension of the prevention principle and recalled that the principle has customary value for it derives from the principle of due diligence, given that the State is required to use all means at its disposal to prevent activities on its territory, or on any land under its jurisdiction, from causing significant damage to the environment of another State.[344] The Court considered that, as the Uruguay River was a shared resource, significant damage to the other party may be a consequence of damage to navigation, to the overall river system or to the quality of its waters.[345] Although it did not order Argentina to dismantle the Orion mill, it did emphasize that the two States must mutually assure the control and follow-up of industrial activity by pursuing their long and effective tradition of cooperation within the framework of the CARU.[346]

Ireland appealed to the ***International Tribunal on the Law of the Sea***[347] in the case of the MOX factory. In 2001, the ***United Kingdom*** had announced its intention to build a factory to process spent nuclear fuel, on the Irish Sea coast in northwest England some 135 kilometers from Ireland. In its ruling, the Tribunal mandated conservatory measures under the precautionary principle,[348] stipulating that the States collaborate to safeguard the Irish Sea. These measures require the States to cooperate by exchanging information regarding potential environmental consequences arising

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344 See Case concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Judgment of 20 April 2010, § 101: Pulp Mills on the River Uruguay (Argentina v. Uruguay) (icj-cij.org).

345 Ibid., § 103.

346 Ibid., § 281.

347 Created by the 1982 United Nations Convention on the Law of the Sea. (See also the insert at the end of this chapter.)

348 Precautionary Principle No. 15 of the 1992 Rio Declaration : "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

from the commissioning of the MOX plant. Additionally, the States are tasked with monitoring the risks and effects associated with the plant's operations and implementing appropriate measures to prevent pollution of the marine environment resulting from its activities.[349]

5. Litigation between Transnational Corporations and States

An emblematic fight against the privatization of water was the Bolivian "Water War" in Cochabamba. It can be briefly summarized as follows. "***Bolivia***, at the behest of the World Bank, turned over management of the Cochabamba city water and sewage system to a single-bidder concession of international water corporations in 1999/2000. Under the arrangement, which was to last for 40 years, water prices increased immediately from admittedly negligible rates to approximately 20 per cent of monthly family incomes. Citizens' protests were eventually met with an armed military response that left at least six residents dead. The protests continued unabated until the consortium was forced to flee the country."[350] The multinational consortium ***Aguas del Tunari*** filed a complaint with the International Centre for Settlement of Investment Disputes (ICSID, run by the World Bank),[351] demanding US$ 25 million in damages from the Bolivian government for having broken the water privatization contract in 2000 – under pressure from the inhabitants of the region, who had taken over the water self-management. Following a long mobilization by the people throughout the entire country, with international support, the consortium was finally forced to withdraw its complaint to the ICSID.[352] In 2007, Bolivia withdrew from ICSID

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349 *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, 3 December 2001, p.111, The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures (itlos.org)

350 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, E/CN.4/2002/59, 1 March 2002, § 60.

351 https://icsid.worldbank.org/resources/rules-and-regulations/convention/overview

jurisdiction, denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[353]

In ***Mexico***, 10% of the population has no access to drinking water (13 million persons) and 30% of the people have access that is neither sufficient in quantity nor in quality.[354] This perhaps explains why the country is a major consumer of sodas and the world's leading consumer of Coca-Cola. When the Mexican government tried to limit this phenomenon by imposing a tax on sodas,[355] it was sued by ***Cargill*** and forced by a ICSID arbitration tribunal, in 2004, to pay US$ 80 million. In 2009, with the added interest, the fine amounted to almost US$ 95 million.[356]. As Mexico refused to pay, Cargill sued in the courts of the United States and Canada to have the ICSID judgment executed. Mexico tried to have it annulled by the Ontario (Canada) appeals court, without success.[357] Finally, a secret agreement was reached on 5 February 2013.[358]

Mexican NGOs then carried out a major prevention campaign on the noxious effects of sodas and Mexico, on 1 January 2014, enacted a tax of up to 10% on sugared drinks, committing to installing 40,000

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352 Magdalena Bas Vilizzio, "Algunas reflexiones en torno al retiro de Bolivia, Ecuador y Venezuela del CIADI", in Densidades, No. 17, mayo 2015, p. 52.

353 See also *Impunité des sociétés transnationales*, op. cit.

354 According to data from the National Autonomous University of Mexico, https://www.gaceta.unam.mx/sin-acceso-al-agua-potable-10-por-ciento-de-mexicanos/

355 A tax of 20% on drinks made with sugars other than cane sugar, such as high-fructose corn syrup, mainly produced in the United States.

356 ICSID, Cargill, Incorporated and United Mexican States,Case No. ARB(AF)/05/2, 18 September 2009, https://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf

357 Supreme Court of Canada, Bulletin of Proceedings, May 11, 2012 , pp716-717, https://www.italaw.com/sites/default/files/case-documents/ita0927.pdf

358 N. Raymond, "Cargill settles NAFTA dispute with Mexico", in *Reuters*, 22 February 2013, https://www.reuters.com/article/us-cargill-mexico-idUSBRE91K1GB20130221

drinking fountains with drinking water in schools and public places.[359]

From the Law of the Sea to the Law of the Oceans

Numerous international treaties "regulate" the use of seabeds, navigation and the prevention of pollutants in the seas.[360] While this insert is not at all intended to be an exhaustive presentation of the subject, we wish to draw attention to a few aspects regarding human rights in general, to ESCR and to the right to water in particular, given that the seas and oceans constitute vital spaces for all living creatures.

Among the treaties, one should mention especially the United Nations Convention on the Law of the Sea. Adopted in 1982 and entered into force in 1994,[361] this convention establishes inter alia, the limits of States' sovereignty over their territorial waters (up to 12 nautical miles from the shore)[362] and an exclusive economic zone of 200 nautical miles, as well as sovereign rights over natural resources and over certain economic activities, on the understanding that the limit of the continental shelf can be extended "in certain cases".[363]

359 A. Calvillo Unna, "The crucial role of civil society, The battle over the tax on sugary drinks in Mexico", Medicus Mundi Suisse, Bulletin 145, mars 2018, https://www.medicusmundi.ch/de/advocacy/publikationen/mms-bulletin/kein-business-as-usual-gegen-nichtuebertragbare-krankheiten/the-way-forward-wie-ngos-der-epidemie-entgegenwirken/the-battle-over-the-tax-on-sugary-drinks-in-mexico

360 International Convention for the Prevention of Pollution from Ships (MARPOL), adopted in 1973; entered into force in 1983: https://www.imo.org/en/about/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx

361 https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

362 In practice, this limit can be shorter (6 miles) owing to the closeness of the territories of certain States, such as Greece and Turkey.

363 https://www.un.org/en/global-issues/oceans-and-the-law-of-the-sea

Ratified so far by 168 States with the notable exception of the United States and the United Kingdom, this convention has gathered numerous reservations by signatory States, careful to preserve their particular interests.[364] Moreover, this convention is honored more in the breach than in the observance given that most States have neither the capacity nor the means (ships, submarines, personnel, surveillance equipment etc.) to assert their sovereignty in these areas. In practice, only the great powers or their transnational corporations use and exploit these areas, causing much damage to the environment and to the biodiversity that is indispensable to all life on the planet.

In fact, it is enough to observe the industrial overfishing in the seas and the high seas, which has practically emptied these spaces of their resources, preventing the reproduction of the fish. The absurdity reaches its height in fishing for sea fish to feed fish farms.[365] Maritime trade, representing 80% of world trade,[366] is a gigantic source of pollution (e.g. degassing of ships) and sometimes can be as dangerous (fossil fuel transport resulting in oil spills or fires among other things), not to mention cruise line tourism and mountains of trash, in particular plastic, mindlessly discarded. The cooling of nuclear reactors and data centers, the militarization of the seas and oceans constitute other threats and sources of pollution for the environment and the living creatures that depend on it.

In this context, one must give a cautious welcome to the recent agreement, announced with great pomp and ceremony, to adopt

364 https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en

365 Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, A/HRC/19/75, 24 February 2012, §19.

366 https://www.wto.org/english/tratop_e/serv_e/transport_e/transport_maritime_e.htm

an international treaty for the protection of the high seas, supposedly to create more broadly protected marine areas in the high seas and to set up environmental impact studies to regulate activities and prevent damage to marine biodiversity.[367]

At the time of writing, we did not have access to the text of this treaty; however, one may expect that, like the Rio Convention on biodiversity, it will be one more instrument for the commodification of nature.[368] The seas and the oceans, like other water sources, are considered by the dominant political and economic powers a source of profit and not a source of life. Indeed, a summit was held in March 2023 in Jamaica to authorize the extraction of minerals from the seabed.[369]

[367] https://uicn.fr/accord-sur-le-traite-international-pour-la-protection-de-la-haute-mer-bbnj/

[368] See inter alia *La nature sous licence ou le processus d'un pillage*, Vandana Shiva, CETIM, Geneva, 1994.

[369] Cf. "Les abysses, futur de l'extraction minière ?", *Le Temps* (Switzerland), 30 March 2023.

CHAPTER 3

THE RIGHT TO HEALTH

At first glance, it might seem strange to speak of health as a right when reality demonstrates that a growing portion of the world's population is witnessing its state of health degrade and even its very existence is threatened.

Climate disruption, manifested in droughts, desertification, floods, forest fires and the melting of glaciers, has proceeded apace. The consequences of this crisis are not limited to disease and the appearance of new viruses, but also threaten food production and biodiversity, which are indispensable for preserving everyone's health.

Already 20 years ago, the World Health Organization (WHO) was sounding the alarm about this danger. According to the WHO, a third of all illnesses is caused by environmental degradation.[370] This figure alone suffices to demonstrate the importance of a healthy environment – which is also a human right – for health and for the enjoyment of the other human rights. Nonetheless, one might mention some recent WHO figures.

> *Almost the entire global population (99%) breathes air that exceeds WHO air quality limits, and threatens their health. A record number of over 6,000 cities in 117 countries are now monitoring air quality, but the people living in them are still breathing unhealthy levels of fine particulate matter, with people in low- and middle-income countries suffering the highest exposures.*[371]

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370 WHO. 9 May 2002, https://www.who.int/news/item/15-03-2016-an-estimated-12-6-million-deaths-each-year-are-attributable-to-unhealthy-environments.

371 WHO, 4 April 2022, https://www.who.int/news/item/04-04-2022-billions-of-people-still-breathe-unhealthy-air-new-who-data.

In 2022, globally, at least 1.7 billion people use a drinking water source contaminated with faeces. Microbial contamination of drinking-water as a result of contamination with faeces poses the greatest risk to drinking-water safety, which represents a high risk in terms of security and of transmission of illnesses such as diarrhea, cholera, dysentery, typhoid fever and polio.[372]
In 2021, 1.6 million persons died from tuberculosis, and 10.6 million persons were afflicted by this illness.[373]
A million persons die every year from lead poisoning.[374]
In 2020, 627,000 persons died from malaria, of whom 95 % were on the African continent.[375]

Moreover, "the WHO estimates a projected shortfall of 18 million health workers by 2030, mostly in low- and lower-middle-income countries."[376]

However, the right to health is recognized in numerous international human rights instruments and national legislation. Further, it is recognized that the realization of the right to health is closely linked to and dependent on the realization of the other human rights, chiefly economic, social and cultural rights.

The majority of the world's diseases, like most of the world's deaths, result from the non-satisfaction (or sometimes the insufficient satisfaction) of basic needs such as the lack of or non-access to sanitation, to drinking water and to food,[377] which are certainly the

[372] https://www.who.int/news-room/fact-sheets/detail/drinking-water.
[373] WHO, 27 October 2022, https://www.who.int/news/item/27-10-2022-tuberculosis-deaths-and-disease-increase-during-the-covid-19-pandemic.
[374] https://www.who.int/news/item/23-10-2022-almost-1-million-people-die-every-year-due-to-lead-poisoning—with-more-children-suffering-long-term-health-effects.
[375] https://www.who.int/fr/health-topics/malaria#tab=tab_1.
[376] https://www.who.int/fr/health-topics/health-workforce#tab=tab_1
[377] According to the FAO, in 2021, 828 million persons were suffering from hunger, and 2.3 billion were in a situation of moderate or serious food insecurity: https://www.fao.org/newsroom/detail/un-report-global-hunger-SOFI-2022-FAO/

most important and urgent. The evolution of public health throughout the nineteenth century in Europe and in the United States demonstrates that the main interventions to substantially improve the state of health of their populations occur outside health services. The realization of the right to health is firmly tied to the realization of economic, social and cultural rights: food, adequate housing, hygiene, healthy on-the-job work conditions, the exercise of freedom (especially trade union freedom), etc. It is also tied to peace and security. In other words, the preservation and promotion of health implies more than access to health services and medicines.

It would seem that there has been a realization along these lines in the United Nations agencies, which recently have been advocating for "one health". This concept "recognizes [that] the health of humans, domestic and wild animals, plants, and the wider environment (including ecosystems) are closely linked and inter-dependent."[378] If this concept, like so many others, is not hijacked and rendered meaningless by the powers-that-be, it can be promising. That said, its success necessitates a radical change in the ways we produce and consume, as well in the distribution of wealth and in the international order.

For it is precisely the unjust international order that is at the origin of the inequality and poverty that prevent the realization of the right to health. Macro-economic policies and, in particular, unjust trade agreements, the debt burden and the continuing appropriation of national resources (human and material) – imposed on "developing" countries especially by the international financial institutions – have provoked a substantial increase in poverty and inequality between and within countries.

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[378] Joint Tripartite (FAO, OIE, WHO) and UNEP Statement, 1st December 2021, https://www.who.int/news/item/01-12-2021-tripartite-and-unep-support-ohhlep-s-definition-of-one-health

Non-democratic organizations – the IMF and World Bank as well as the World Trade Organization (WTO)[379] – favor private capital and transnational corporations rather than peoples; they make economic and social decisions at the national and international levels that affect the life of all peoples.

The inextricable connections between the military-industrial complexes and the centers of power in the rich countries represent a permanent threat to world peace and security, resulting in the siphoning off of the resources that are social and public assets, not to mention wide-scale environmental destruction and suffering inflicted on hundreds of millions of persons.

This process keeps the majority of the world's populations in a state of powerlessness and fear rather that democracy and peace, which are requisite conditions to the realization of the right to health.

However, 40 years ago at Alma Ata, the international community seemed already to have understood this situation and the importance of international cooperation in remedying it.

> *The existing gross inequality in the health status of the people particularly between developed and developing countries as well as within countries is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.*[380]

Since then, the situation has worsened, given that the Alma Ata Declaration not only was never implemented but that neoliberal policies have been imposed throughout the world including in the

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379 We should not be taken in by the veneer of democracy purveyed by the WTO by its application of the "one country, one vote" principle enshrined in its statutes: the great powers exercise within it an clearly disproportionate weight. And rivalry among these powers is the main cause of blockage in recent years.

380 *Declaration of Alma-Ata*, adopted 12 September 1978 at the WHO international conference on primary care, § 2: https://iris.who.int/bitstream/handle/10665/347879/WHO-EURO-1978-3938-43697-61471-eng.pdf?sequence=1

area of health care, resulting in, for example, a commercially oriented selective approach to research and the treatment of disease, and the privatization of public services.[381] Thus, although there is a health ministry in most countries – admittedly with highly variable means and margins of maneuver – and although all States in their capacity as members of the WHO have committed themselves to honoring the principles of its constitution, one must acknowledge that the mere recognition of the right to health, as elaborated in the international instruments, is insufficient for its concrete realization. This is why the affirmation of health as a right and the definition of its ties to other rights are the only way to establish the obligations of the various actors with a view to its realization. In other words, the commitment of the State, as guarantor of human rights, is essential in the fulfillment of the right to health.

A. Definition and Content of the Right to Health

1. The Absence of Sickness Does Not Mean Good Health

The WHO constitution is unequivocal in defining health.

> *Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.*[382]

2. The Right to Health: an Inalienable Individual Right

This is recognized unambiguously in ICESCR.

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381 Katz, Alison et al. *La santé pour tous! Se réapproprier Alma Ata*, (Geneva: CETIM, 2007); Akincilar, Murad. *Covid-19: Une pandémie révélatrice d'un maldéveloppement généralisé* (Geneva: CETIM, 2023).

382 Constitution of the World Health Organization, Preamble, §§ 1 and 2: https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1

> *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (Art. 12.1)*

For the United Nations CESCR, the chief body at the international level overseeing the implementation of the right to health, health *"is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity"*.[383]

3. The Right to Health Is Not Limited to Medical Care

For the United Nations Special Rapporteur on the Right to Health, *"The right to health, enshrined in numerous international and regional human rights treaties and in many national constitutions, is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to clean water and sanitation, adequate housing and nutrition as well as social determinants such as gender, racial and ethnic discrimination and disparities."*[384]

4. The Right to Health: Indissociable from and Interdependent with Other Rights

The ***Universal Declaration of Human Rights***, which constitutes the source of all human rights and is the basic instrument in force, mentions the right to health in Article 25, which covers a whole series of economic, social and cultural rights to firmly emphasize the interdependence of these rights:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood,*

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383 CESCR, *General Comment No. 14*, 11 May 2000, § 1.

384 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, A/HRC/11/12, 31 March 2009, § 8.

> *old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.*

In this regard, the Committee specifies that the right to health, just like the other rights,

> *is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights,*[385] *including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.*[386]

This means that its realization depends on various factors that do not pertain directly to health services but to the realization of other rights, including civil and political rights such as participation in decision-making and the right to association, which are indispensable, for example, to the elaboration and implementation of an effective and non-discriminatory health-care system.

B. Pertinent International and Regional Norms

Besides the international instruments cited above, which constitute the base of the right to health, several international and regional conventions and treaties enshrine the right to health. Some of the major ones are as follows.

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385 The *International Bill of Rights* comprises the *Universal Declaration of Human Right*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

386 CESCR, *General Comment No. 14*, § 3.

1. At the International Level

Nobody should be excluded

Among the international instruments that have included the right to health, the ***International Convention on the Elimination of all Forms of Racial Discrimination*** stipulates that its States parties undertake to guarantee the right of everyone to health, to medical care, to social security and to social services (Art. 5.e: iv).

Equality must be respected

In the ***Convention on the Elimination of All Forms of Discrimination against Women*** the States parties commit themselves to taking all appropriate measures to ensure, on an equal basis, the protection of everyone's health (Art. 11.1: f).

> *Specifically, the States parties are to take all appropriate measures to eliminate discrimination against women in the field of health care (...) (Art 12.1).*

Specific Measures regarding Children

The ***Convention on the Rights of the Child*** specifies, inter alia, that "*States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.*" (Art 24.1)

This convention also requires that States parties, inter alia, take measures with a view to *"combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution."* (Art. 24.2.c)

The Right to Health of Persons with Disabilities

The ***Convention on the Rights of Persons with Disabilities*** recognizes that *"persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability"* (Art. 25) and requires that States parties to the convention, inter alia, *"provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes."* (Art. 25.a)

Further, besides the above-mentioned convention and notwithstanding the direct and indirect references to the right to health in many international human rights treaties as well as in international humanitarian law, the United Nations General Assembly has adopted four texts specifically concerned with persons with disabilities: 1. the Declaration on the Rights of Mentally Retarded Persons;[387] 2. the Declaration on the Rights of Disabled Persons;[388] 3. Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health;[389] and 4. Standard Rules on the Equalization of Opportunities for Persons with Disabilities.[390]

Migrants' Right to Health

The ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*** excludes all discrimination against migrants in matters of health (Art. 28).

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387 General Assembly Resolution 2856 (XXVI), 20 December 1971.
388 General Assembly Resolution 3447 (XXX), 9 December 1975.
389 General Assembly Resolution 46/119, 17 December 1991.
390 General Assembly Resolution 48/96, 20 December 1993.

Indigenous Peoples' Right to Health

The ***United Nations Declaration on the Rights of Indigenous Peoples*** not only recognizes these peoples' right to health (Art. 24) but also requires their active involvement in the elaboration and management of health programs:

> *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programs affecting them and, as far as possible, to administer such programs through their own institutions. (Art. 23)*

This declaration also recognizes the right of indigenous peoples to preserve their traditional medicine and to benefit from social services.

> *Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. (Art. 24.1)*

Peasants' Right to Health

Several articles in the ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas***[391] are tied to the right to health. Article 23 deals specifically with it.

> *1. Peasants and other people working in rural areas have the right to the enjoyment of the highest attainable standard of physical and mental health. They also have the right to have access, without any discrimination, to all social and health services.*
> *3. States shall guarantee access to health facilities, goods and services in rural areas on a non-discriminatory basis (…).*

[391] Adopted by the General Assembly 17 December 2018, A/RES/73/165.

As is the case with indigenous peoples, this article also enshrines peasants' right *"to use and protect their traditional medicines and to maintain their health practices, including access to and conservation of their plants, animals and minerals for medicinal use."* (Art. 23.2)

Article 14.2 of this Declaration prohibits all exposure of peasants to dangerous products:

> *Peasants and other people working in rural areas have the right not to use or to be exposed to hazardous substances or toxic chemicals, including agrochemicals or agricultural or industrial pollutants.*

Given the major role played by the peasantry in the preservation of the environment and biodiversity, the Declaration also recognizes (Art. 18) the right of peasants to enjoy *"a safe, clean and healthy environment […] contribute to the design and implementation of national and local climate change adaptation and mitigation policies* […to be protected] *against abuses by non-State actors"*. It also requires States to *"take effective measures to ensure that no hazardous material, substance or waste is stored or disposed of on the land of peasants […], and shall cooperate to address the threats to the enjoyment of their rights that result from transboundary environmental harm.*.[392]

Declaration of Alma-Ata and the social determinants of health

The ***Declaration of Alma-Ata***,[393] from the International Conference on Primary Health Care, constitutes without a doubt a major reference point, given that it sets a framework whose aim is to

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[392] For further information, see CETIM, Training sheets on peasants' rights: https://www.cetim.ch/factsheets-on-peasants-rights/

[393] *Declaration of Alma-Ata*, adopted 12 September 1978 at the WHO international conference on primary health care: https://iris.who.int/bitstream/handle/10665/347879/WHO-EURO-1978-3938-43697-61471-eng.pdf?sequence=1

improve the social determinants of health[394] and universal coverage. It states that primary care:

> *addresses the main health problems in the community, providing promotive, preventive, curative and rehabilitative services accordingly (VII.2); includes at least: education concerning prevailing health problems and the methods of preventing and controlling them; promotion of food supply and proper nutrition; an adequate supply of safe water and basic sanitation; maternal and child health care, including family planning; immunization against the major infectious diseases; prevention and control of locally endemic diseases; appropriate treatment of common diseases and injuries; and provision of essential drugs. (VII.3)*

Many United Nations world summit conferences refer to the right to health. For example, it figures in several paragraphs of the *Vienna Declaration and Program of Action*.[395] The *Program of Action of the International Conference on Population and Development*[396] and the *Beijing Declaration and Platform for Action from the Fourth World Conference on Women*[397] also contain definitions concerning, respectively, reproductive health and the health of women.[398]

2. At the Regional Level

Several regional human rights instruments also recognize the right to health. The main ones are the following.

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394 According to the Rio Political Declaration on Social Determinants of Health, 21 October 2011, the social determinants of health include "early years' experiences, education, economic status, employment and decent work, housing and environment, and effective systems of preventing and treating ill health" (§ 6).

395 Vienna Declaration and Program of Action, §§ 11, 18, 24, 31 and especially 41, adopted by the World Conference on Human Rights, Vienna, 14 to 25 June 1993.

396 Held in Cairo, 5 to 13 September 1994.

397 Held in Beijing, 4 to 15 September 1995.

398 CESCR, *General Comment No. 14*.

Article 16 of the ***African Charter on Human and Peoples' Rights*** aligns with the provisions of the other international instruments.

> *Every individual shall have the right to enjoy the best attainable state of physical and mental health. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*

The ***African Charter on the Rights and Welfare of the Child*** recognizes, for every child, *the right to enjoy the best state of physical, mental and spiritual heath possible* (Art. 14). To accomplish this, States must take adequate and necessary measures. Moreover, the Charter prohibits *any form of economic exploitation and the exercise of any work* that might endanger the child, disrupting the child's education or compromising the child's health (Art. 15.1).

According to the ***European Social Charter***,

> *With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organizations, to take appropriate measures designed inter alia: 1. to remove as far as possible the causes of ill-health; 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents. (Art. 11)*

In the same vein, several of the Charter's articles enshrine closely related rights: the right to social security (Art. 12); the right to social and medical insurance (Art. 13); and the right to benefit from social welfare services (Art. 14).

In context of the ***Americas, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*** (Protocol of San Salvador) stipulates that "*everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being*", while

specifying the measures that States parties must take (Art. 10). The Protocol also enshrines the right to a healthy environment (Art. 11).

C. International Obligations of States and Other Actors

The content of the right to health shows clearly how much this right is indissociable from and interdependent with other human rights, and the necessity to undertake concerted actions within the international community. Although States are the primary parties concerned, the actions and orientations of international organizations and institutions as well as those of the private sector play an ever more important role in the area of health. As for civil society, it must ensure that these actors contribute to the realization of the right to health.

1. States

In spite of their obvious weakening in recent decades due the power of transnational corporations, States remain, as subjects of international law, the main actors in the realization of human rights, including the right to health. As is the case with the other human rights, States have three levels of obligations regarding the right to health: *respect*, *protect* and *fulfill*.[399]

The obligation to ***respect*** prohibits States from adopting discriminatory policies or measures, in particular with regard to the most needy and vulnerable. For example, they must not deprive their populations of their means of subsistence nor arbitrarily evict them from their homes, nor impede their access to medical care. In short, they must refrain from any action that could be harmful to health.

The obligation to ***protect*** requires that States prevent third parties from compromising the right to health. This involves adopting adequate legislation to guarantee the enjoyment of the right to

[399] CESCR, *General Comment No. 14*, §§ 33 to 37.

health. For example, they must ensure equality of access to health care and to social insurance, including services provided by third parties. Thus, States may not allow "the market", especially transnational corporations active in the health-care sector, to influence the development of public policy and must ensure that these entities do not impede universal enjoyment of the right to health.

The obligation to ***fulfill*** means that States are required to, inter alia, "*ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions"*.[400] For example, they must create a health insurance system (public, private or mixed) affordable for all.[401]

a) Lack of Resources and International Cooperation

In *General Comment No. 14*, while recognizing *"the formidable structural and other obstacles resulting from international and other factors beyond the control of States"* (§ 5), the CESCR distinguishes inability from unwillingness (§ 47). Consequently, if there is a lack of resources, the State *"has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal"* (§47) to honor its obligations under the Covenant. In this regard, the Committee has emphasized 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' […]."* (§45)

[400] Ibid. § 36.
[401] Ibid.

b) States' Collective Actions in Favor of the Right to Health and the Prohibition on Embargoes[402]

The CESCR reminds States parties to the ICESCR that they *"have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries"* (§39). Further, the Committee enjoins them to facilitate access to care, services and health essentials as far as possible, to provide, if needed, necessary aid (§39) and to *"refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure."* (§41).

c) Non-compliance with Obligations by States

The CESCR lists, inter alia, the following elements that constitute a failure by States to comply with their obligations:

- the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination (§ 50);
- the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations (§50);
- the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others (§51);
- the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food (§51);
- the failure to protect women against violence or to prosecute perpetrators (§51);

[402] See in this regard the reports of the Special Rapporteur on Unilateral Coercive Measures: https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures.

- insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups (§52).

2) International Organizations and Institutions

Specializing in the area of health, the WHO, by virtue of its mandate, occupies a preponderant place among the international organizations and plays a central role in the promotion and implementation of health for all. The main objective of the WHO is *"the attainment by all peoples of the highest possible level of health."*[403]

Created on the ruins of the Second World War, it was given the mandate to preserve and promote public health through international cooperation. This cooperation was motivated, according to the founders, by the rapid spread of epidemic diseases such as cholera, the plague and yellow fever, linked to the expansion of international relations and trade that had been made possible by the development of means of transport and communication.[404] Like the other specialized agencies of the United Nations system, it was also driven by the need for functional, *ad hoc* network arrangements among nations, based on common interests. This cooperation would contribute to peaceful change in international relations and the the preservation of peace.[405] The WHO constitution also affirms that the *"health of all peoples is fundamental to the attainment of peace and security."*[406]

Today, all the members States of the United Nations are also members of the WHO, which represents an advantage for international cooperation and coordination. Numbering almost 8,000 public health specialists throughout the world, the WHO experts provide guidance, set health standards and help countries deal with

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403 Constitution of the World Health Organization, Art. 1.

404 L'Organisation mondiale de la santé (Que sais-je?, April 1997).

405 Ibid.

406 Constitution of the World Health Organization, Preamble.

public health problems.[407] Moreover, the WHO also supports and encourages health research. Through it, governments can work together to tackle global health problems and contribute to the well-being of populations.[408] The WHO proudly claims, for example, the eradication of smallpox in 1979 and the adoption of the Framework Convention on Tobacco Control in 2003.

While the advantages and the central role of the WHO are undeniable, one must also bear in mind that the WHO today has been deeply infiltrated by neoliberal ideology[409] and that the pharmaceutical industry has become ever more influential in this institution since the 1980s. This has reached the point where fixed contributions (member States' annual dues) represent no more than 16% of its "Programme Budget".[410] This allows the private commercial sector and a few powerful member States to determine the WHO's priorities through specifically defined, or "earmarked", donations with conditions attached.

Among the other international organizations active in the field of health are UNICEF, which works for children's right to health, as well as the *Office of the United Nations High Commissioner for Refugees (UNHCR)*, the *International Federation of Red Cross* and *Red Crescent Societies* and the *International Committee of the Red Cross* (ICRC), which play major roles in the area of health, looking after (depending on the mandate) refugees or persons displaced by natural disasters, even if these organizations are sometimes less than effective owing to lack of resources or for political reasons. It goes without saying that these organizations are also dependent on private funds, as is the case with UNICEF, which engages in partnerships with

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407 WHO Presentation: Oeuvrer pour la santé, Geneva, 2006.

408 Ibid.

409 Article by Alison Katz in ONU: droits pour tous ou loi du plus fort? (Geneva: CETIM, 2005).

410 WHO, "Note for media", 24 May 2022: https://www.who.int/news/item/24-05-2022-daily-update---24-may-2022.

transnational corporations such as McDonald's and Coca-Cola,[411] thus endangering their credibility. These bodies are not the only ones that can be cited, for the entire United Nations machinery has been immersed in "partnerships" with transnational corporations since the launch of the *Global Compact*,[412] whence the urgent call from the United Nations Research Institute for Social Development (UNRISD) to "rethink" the notion of "partnerships" between the United Nations and transnational corporations.[413]

As to the international financial institutions (the World Bank and the International Monetary Fund), their nefarious role in the degradation of public services is well known. In this regard, the CESCR has also had its say:

> *States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.*[414]

3) The Private Business Sector

Profit-driven, the private business sector now has a deleterious influence on the evolution of public health policies, as mentioned above, whence the urgent warning from the CESCR regarding the duty of States

> *to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical*

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411 *Les obstacles à la santé pour tous*, (Éditions Centre Tricontinental et Syllepse, August 2004).

412 See, inter alia, Özden, Melik. *Transnational Corporations and Human Rights* (Geneva: CETIM, March 2006); Richter, Judith. *Building on Quicksand* (Geneva: CETIM, IBFAN-GIFA and the Declaration of Bern, April 2004).

413 Ibid.

414 CESCR, *General Comment No. 14*, § 39.

equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.[415]

Private entities active in the health sector must ensure that they do not harm health, directly (through harmful products) or indirectly (environmental pollution, misleading advertising etc.), nor create obstacles to the enjoyment of the right to health (e.g. charging exorbitant prices for medicines).

4) Civil Society

The dramatic health conditions and the numerous obstacles to access to health care in many countries have motivated civil society to organize in order to influence governments that are often inert or openly complicit with the appetite of the private business sector.

It was thanks to the major mobilization of civil society at the national and international levels that 39 transnational corporations withdrew the complaint that they had filed in Pretoria on 5 March 2001 against a 1997 South African law favoring the importation of generic medicines and price controls for the fight against HIV/AIDS.

At the international level, networks are proliferating in the various social forums, but the organization that gathers the broadest support seems to be the People's Health Movement (PHM). Starting from the observation that *"inequality, poverty, exploitation, violence and injustice are at the root of ill-health and the deaths of poor and marginalized people"*,[416] the PHM fights for the right to health, for a new model of society with more solidarity, empathy, equity and humanity, which safeguards human lives and ecosystems.[417]

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415 Ibid., § 35.

416 Preamble of the PHM Charter adopted at Dhaka (Bangladesh) in December 2000.

417 PHM Charter, adopted à Savar (Bangladesh) in November 2018.

D. Examples of Implementation

Independent of health ministries and other such instances, there are special mechanisms to monitor the right to health. However, they are limited, and recourse to them is rare. This situation persists even though recourse and redress in the event of violation of this right must be the rule, as declared unambiguously by the CESCR.

> *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. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.*[418]

1. At the National Level

In its ruling on *J O O (also known as J M) v Attorney General & 6 others* of 22 March 2018,[419] the High Court of Bungoma county (***Kenya***) judged that there was violation of the right to health, in particular the right to maternal health, in the case of a women who had given birth in an overcrowded hospital and suffered mistreatment from the hospital staff (she had had to give birth lying on the floor unconscious without assistance and was woken up by the cries and blows of the personnel). While recalling that the right to health is protected not only by the Kenyan constitution (Art. 43.1) but also, inter alia, by the African Charter on Human and Peoples' Rights (Art. 16) and by the ICESCR (Art. 12), the High Court emphasized that the national government and the Bungoma county government were responsible for the negligence that the patient had suffered for they had not properly implemented the health care

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418 CESCR, *General Comment No. 14*, §59.

419 J O O (also known as J M) v. Attorney General & 6 Others [2018] eKLR: http://kenyalaw.org/caselaw/cases/view/150953/.

directives and had not guaranteed the quality and availability of the medical services (maternal care is free of charge).

The Supreme Court of ***Japan*** was asked to revoke the licenses that had allowed the creation of an industrial waste treatment plant.[420] The court ruled that all the plaintiffs who lived within a radius of 1.8 kilometers of the plant had standing to request the revocation of the licenses because they lived in a zone where one could expect to suffer injury to one's health or one's living conditions owing to the problems caused by the dangerous substances spilled by the treatment site.

Ruling on compensation linked to the health status of an employee, the Court of Cassation (***France***) declared that an employer can be held liable in the event of dismissal for physical incapacity, and the employer must, in addition to paying compensation for the dismissal, pay compensation for harm resulting from the degradation of the employee's health if it is attributable the dismissal.[421] This ruling was confirmed by the European Committee of Social Rights in a case involving unemployment compensation and compensation for harm to the employees unjustifiably dismissed.[422]

Following its consideration of 19 cases of women who were pregnant, breast-feeding or on maternity leave while working in the public sector, the Constitutional Court of ***Ecuador*** recalled, in its 5 August 2020 ruling, that the right to public health is a basic right. Acknowledging that the right to health, especially sexual and reproductive health, is protected by the Constitution and

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420 Cf. 2012 (Gyo-Hi) 267, 29 July 2014: https://www.globalhealthrights.org/wp-content/uploads/2015/11/2012-Gyo-Hi-267.-Japan.pdf.

421 Decision of the Court of Cassation, Social Chamber, 2 March 2011, No. 08-44977.

422 The decision on the merits, Complaints No. 160/2018 and No. 171/2018, https://www.coe.int/en/web/european-social-charter/-/the-decision-on-the-merits-in-confederation-generale-du-travail-force-ouvriere-cgt-fo-v-france-complaint-no-160-2018-and-confederation-generale-du-tra

international law instruments, the Court elaborated measures of full compensation in case of violation of this right.[423]

In *SU-225/98* of 20 May 1998,[424] the constitutional court of ***Colombia*** found against the Colombian State for its inaction when faced with the lack of access to health of 418 families, given that the health minister and the district secretary of health of Santa Fé de Bogotá had not provided free vaccinations against meningitis for the children and mothers working in the informal economy. Through this ruling, the court enlarged the concept of the right to health as a basic constitutional right and recalled that it is always justiciable in the case of persons benefiting from special constitutional protection (children, pregnant women and the elderly).

2. At the Regional Level

In *Poblete Vilches and others v. Chile* of 8 March 2018,[425] the ***Inter-American Court of Human Rights*** ruled that the Chilean State was responsible for violations of the rights to health, to life, to personal integrity, to access to information and to informed consent of Vinicio Poblete Vilches (an elderly patient who, in a public hospital, had received poor quality medical treatment before his death) and of his family. The court recognized that the right to health is an autonomous (distinct) right within the framework of the economic, social, cultural and environmental rights guaranteed by Article 26 of the American Convention on Human Rights. Consequently, it requested that ***Chile*** immediately adopt measures to protect the right to health as well as progressive measures intended to advance as fast and as effectively as possible toward the complete fulfillment of this right.

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423 Decision No. 3-19-JP / 20 and joindered cases: https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=3-19-JP/20.

424 https://www.corteconstitucional.gov.co/relatoria/1998/SU225-98.htm.

425 https://www.corteidh.or.cr/docs/casos/articulos/seriec_349_esp.pdf.

In another decision, on 1 October 2021 (*Vera Rojas and others v. Chile*),[426] the Inter-American Court of Human Rights affirmed that Chile had violated the rights to life, to a life in dignity, to personal integrity, to health, to social security, to non-discrimination and to the protection of children for not having properly regulated the private actors of the health system. Chile thus failed in its obligation to prevent third parties from impeding everyone's – including children's – right to health. The Court's decision emphasized also that treatment and rehabilitation for the disabled, as well as palliative care, are essential elements of the right to health.

In *International Commission of Jurists* (ICJ) *and the European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, the ***European Committee of Social Rights*** ruled that as the rights of migrant children (refugees and asylum seekers for the most part), regardless of their immigration status, are guaranteed by the European Social Charter, ***Greece*** had violated Articles 11.1 and 3 of the Charter (right to health protection) by not providing appropriate lodging and health care to migrant children living in the street or in "preventive detention". The Committee noted that an appropriate lodging is a necessary preventive measure for reducing the risk of physical and mental health problems in children and that migrant children lacked appropriate lodgings. Moreover, on the Greek islands, there is a continuing lack of facilities and of medical and psychological personnel.

Regarding this case, in *Recommendation CM/RecChS(2022)2*, adopted 20 April 2022, the Committee of Ministers of the Council of Europe, while recognizing that Greece, "as a country of first entry, shoulders a large share of the responsibility for the reception of the influx of migrants entering Europe and that the States Parties to the Charter have a duty of international assistance and cooperation so as to enable the attainment of conditions in which the rights of

[426] https://www.corteidh.or.cr/docs/casos/articulos/seriec_439_esp.pdf

extremely vulnerable children, both accompanied and unaccompanied, are secured (...)", nonetheless urged Greece to take adequate measures to "increase the national accommodation capacity for accompanied and unaccompanied migrant children, including accommodation for accompanied children on the islands; (...) to proceed to the reform and full implementation of a law on guardianship of unaccompanied minors; (…) to strengthen the implementation of the regulatory framework for the education of accompanied and unaccompanied migrant children, in particular on the islands."[427]

In its ruling of 9 April 2013 concerning *Mehmet Şentürk and Bekir Şentürk v. Turkey – 13423/09*,[428] the ***European Court of Human Rights*** found against ***Turkey*** for having refused to perform emergency surgery on a pregnant woman (Menekşe Şentürk) because of her inability to pay for the operation.

3. At the International Level

Following a communication on the situation of a stateless child, the ***Committee on the Rights of the Child*** found against ***Switzerland*** for violations of the right to health (Arts 3, 24, 39 of the Convention on the Rights of the Child) and of the right to privacy (Art. 16 of the same Convention), in the event of the child's return to Bulgaria.[429] Switzerland had not verified the conditions of access to medical care and other services necessary for the physical and psychological adaptation and social reinsertion of the child in Bulgaria. The Committee considered that the mental health of the mother as the child's sole person of reference and provider of care is essential for the harmonious development and survival of the child (§ 10.8 of the decision). Thus, the Committee ruled on the right to health of both

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427 https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a64113

428 https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=002-

429 Communication No. 95/2019, CRC/C/88/D/95/2019, 3 November 2021.

the child and the mother and enjoined the State to verify that this right would be respected in the country of return.

In *Toussaint v. Canada*,[430] the plaintiff contested the refusal by ***Canada*** to grant undocumented migrants medical coverage. In its ruling of 24 July 2018, the ***Human Rights Committee*** affirmed that States are obliged, under Article 6 of the International Covenant on Civil and Political Rights (including the right to life) to ensure access to existing health services that are reasonably accessible when the absence of these services would expose a person to a reasonably foreseeable risk, possibly ending in death. The Committee requested that Canada revise its laws in order to guarantee migrants in a situation of irregularity access to essential medical care. This decision highlighted the interdependence of all human rights, especially the right to health and the right to life.

The ***Committee on the Elimination of Discrimination against Women***, in its decision of 14 August 2006 on an allegation of forced sterilization of a Romani Hungarian woman,[431] found a violation of the right to health (Arts 10.h and 12 of the Convention on the Elimination of all Forms of Discrimination Against Women) and in particular the right to sexual and reproductive health (Art. 16.e). The Committee asked ***Hungary*** to revise its legislation concerning informed consent in cases of sterilization, to ensure that it is in conformity with medical standards and international human rights norms and to monitor the practice of medical centers, both public and private.

Health – Intellectual Property

> The origin of the right of everyone to benefit from the protection of moral and material interest deriving from any scientific, literary or artistic production of which the person is

[430] Communication No. 2348/2014, CCPR/C/123/D/2348/2014, 24 July 2018.

[431] Communication No. 4/2004, CEDAW/C/36/D/4/2004 , 29 August 2006.

author or creator (Universal Declaration of Human Rights, Article 27, §§ 2 and 1:c and the ICESCR, Article 15), known – wrongly? – as intellectual property, is to be found in the *Bern Convention for the Protection of Literary and Artistic Works*.[432] Its objective was to encourage creators to actively contribute to the arts and sciences and to social progress generally.[433]

In our times, this human right has been diverted from its initial objective, and transnational corporations use it without compunction in their search for unbridled profit, patenting their "inventions", including patents on living organisms, with disturbing consequences for health. For example, patents in pharmaceuticals and biotechnology pose numerous problems. Thus, very often, the pharmaceutical and agribusiness transnationals obtain patents for "their products" after having modified a few genes or molecules or even having obtained them through biopiracy.[434] They then market them, thus creating a monopoly for a relatively long time (usually 20 years, under agreements elaborated at the WTO).

However, the accumulation of knowledge and the result of research are often the fruit of the knowledge and experimentation of several generations – and even several centuries! For this

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[432] Adopted 9 September 1886 and subsequently revised several times.

[433] CESCR, General Comment No. 17, E/C.12/GC/17, 12 January 2006.

[434] "Biopiracy refers to the privatization of genetic resources (including those derived from plants, animals, micro-organisms and humans) of the people who hold, maintain, incarnate, develop them, improve, create, reinforce and feed them. The most common modus operandi of biopirates is the use of intellectual property rights (for example trade marks, patents, plant variety rights) to obtain monopolistic control of genetic resources which previously were under the control of indigenous peoples, peasants and traditional communities. There is biopiracy even if this process is legal under national laws and even if it results in a signed "bioprospecting agreement" that includes provisions for so-called 'benefit sharing'." See *La propriété intellectuelle contre la biodiversité?* (Geneva: CETIM, 2011).

reason, one should consider them the common heritage of humanity, like Dr Salk who declared in 1955 after discovering the polio vaccine: "This discovery belongs to the people. There is no patent. Can one patent the sun?"[435]

It is exactly this diversion that the CESCR condemned in its 2001 Statement.

Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments.[436]

Moreover, the ICESCR distinguishes intellectual property rights from human rights, given that the former "with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited", and should be used by States "for the benefit of society as a whole"; whereas the latter are "timeless expressions of fundamental entitlements of the human person."[437]

Viewed from this perspective, the patent system, as conceived in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, entered into force in 1995), is contrary to the principles of human rights.

Moreover, in a statement to the Commission on Human Rights in 1995, CETIM drew attention to the nefarious consequences foreseeable in TRIPS:

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435 Quoted in *Les obstacles à la santé pour tous*, (Tricontinental Center and Editions Syllepse, August 2004).

436 Human rights and intellectual property, Statement by the CESCR, E/C.12/2001/15, 14 December 2001.

437 CESCR, General Comment No. 17.

The Agreement on Trade-Related Aspects of Intellectual Property Rights aims to privatize the common intellectual heritage and to divest civil society of its intellectual faculties so that corporations can monopolize intelligence.[438]

Patents on Living Organisms Threaten the Rights to Food and Health

Patents involve more than just medicines. Promoted and protected by the intellectual property regimes of the WTO and the International Union for the Protection of New Varieties of Plants (UPOV), patenting life threatens the rights to food and health. Hereupon follow several examples.

Many patents are filed every year by business enterprises and universities. Although the countries of the tropics and subtropics are home to some 90% of animal and vegetable species, thus of most of the biological heritage of the planet, 97% of patents are held by businesses and research institutes in the rich countries.[439]

According to a 1989 study, roughly a quarter of all medicines are derived from plants from tropical forests, three quarters of which are based on information supplied by indigenous peoples.[440] It goes without saying that the indigenous peoples never see any of the profit thus generated.[441]

It happens – rarely – that this kind of biopiracy is nullified. This was the case with the Indian Basmati rice patented in 1997 under the name Texmati (a cross between Basmati and an American

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438 CETIM oral statement on biotechnologies and the GATT agreements on intellectual property: https://www.cetim.ch/les-biotechnologies-et-les-accords-du-gatt-sur-la-propri%c3%a9t%c3%a9-intellectuelle/

439 Swissaid Bulletin, *Le Monde*, No. 1, January 2006.

440 "Biotechnology and Medicinal Plants" in Rural Advancement Fund International, No. 5, 1989, quoted by Andrew Gray in *La nature sous licence ou le processus d'un pillage* (Geneva: CETIM, 1994).

441 Ibid.

variety) by RiceTec Inc., in Texas (United States). But the intervention of the Indian government was required to force the United States Patent Office to annul the patent, in 2001.[442] The "success" of this fight is certainly due to the Indian government's intervention in the interest of saving its "national heritage". But economic consideration certainly played a role too. While it is indisputably preferable that a country feed its own people before exporting food, the problem is more serious, for, with the patent system, a country's very production is threatened.

In 2006, the agribusiness Monsanto (now absorbed by Bayer) had threatened to resume production of Terminator (sterilized seeds) whereas in 1999 – under pressure from public opinion – it had agreed to halt it.[443] In fact, however, the company has continued to sell hybrid seeds that farmers must buy every year. The objective of agribusiness is obvious: make farmers dependent by preventing them from reusing part of their harvest as seeds. This situation constitutes a threat to food sovereignty and consequently aggravates undernourishment in many regions of the world.

As to GMOs, they threaten organic and traditional farming and violate the precautionary principle.[444] Unfortunately, many governments are currently in favor of this technology whose consequences could turn out to be disastrous for future generations.

It is clear that States have rarely implemented the policy that they championed in the Declaration of Alma-Ata, which is more relevant now than ever:

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442 *Solidaire* No. 163, December 2001.

443 "Interdire Terminator", press release, 21 February 2006.

444 See, inter alia, the annual report of the Special Rapporteur on the Right to Food, E/CN.4/2004/10.

> *An acceptable level of health for all the people of the world by the year 2000 can be attained through a fuller and better use of the world's resources, a considerable part of which is now spent on armaments and military conflicts. A genuine policy of independence, peace, détente and disarmament could and should release additional resources that could well be devoted to peaceful aims and in particular to the acceleration of social and economic development of which primary health care, as an essential part, should be allotted its proper share.*[445]

[445] Declaration of Alma-Ata, adopted 12 September 1978 at the WHO international conference on primary care, § 10.

CHAPTER 4

THE RIGHT TO ADEQUATE HOUSING

The right to adequate housing is one of the economic, social and cultural rights recognized in numerous international and regional normative documents as well as in national constitutions throughout the world. Notwithstanding this recognition, the homeless, those living in inadequate housing, and the evicted are ever more numerous in both urban and rural settings on all the continents. According to United Nations estimates, approximately 100 million persons throughout the world are homeless, with about 15 million being forcibly evicted annually.[446] Around "1.8 billion people worldwide live in homelessness, informal settlements and grossly inadequate housing".[447] Further, "UN-Habitat analysis of housing affordability over the last 20 years indicates that housing has been largely unaffordable for the majority of the world's population."[448]

Over and above the problems of housing per se (i.e., simply having a roof over one's head) the question of housing conditions is deeply disturbing. For instance, in 2018 "about 23.5 per cent of the world's urban population lived in slums."[449] According to the World Heath Organization, "at least 1.7 billion people use a drinking water source contaminated with faeces", and "some 505,000 people are estimated to die each year from diarrhoea as a result of unsafe drinking-water, sanitation and hand hygiene."[450]

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446 United Nations Secretary-General's Report to the 58th session of the Commission for Social Development, E/CN.5/2020/3, 27 November 2019: § 9.

447 https://www.ohchr.org/en/special-procedures/sr-housing/protecting-right-housing-context-covid-19-outbreak.

448 See the previously cited Secretary-General's Report, § 6.

449 Ibid., § 18.

450 https://www.who.int/news-room/fact-sheets/detail/drinking-water

As crucial as they may be, sanitary conditions are far from being the only problems in housing. The negation *de jure* or *de facto*, and the absence of effective implementation, of the right to adequate housing has produced a cascade of dramatic consequences and caused multiple violations of human rights in the fields of employment, education, health, social ties, participation in decision-making (deprivation of civil rights, among others).

Although the UN has organized three world conferences specifically on housing issues and numerous related summits (on development, the environment, etc.) in the past five decades, which have helped to raise public awareness about the gravity of the situation, the declarations and action plans adopted have not been implemented.

The promises of the Millennium Declaration (2000) have not been kept, and we know already that those of the Sustainable Development Goals (2030) will not be kept either.[451] To realize the right to adequate housing for all, we must address the underlying causes of non-access to housing throughout the world, all of which have been identified by the United Nations Special Rapporteur on the Right to Adequate Housing. They include, in particular: speculation on land and housing; expropriation and forced eviction; rural exodus and the concomitant growth of urban slums; discrimination against vulnerable groups, including women, children, refugees, migrants, the elderly and disabled people; natural disasters and armed conflicts; the consequences of climate disruption and global warming; and the negative effects of public service privatization.[452]

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[451] See the reports of the United Nations Secretary-General on the Sustainable Development Goals: 2020, 2021, 2022 and Progress towards the Sustainable Development Goals, E/2021/58, 30 April 2021.

[452] See the annual reports of the United Nations Special Rapporteur on the Right to Adequate Housing to the Commission on Human Rights (from 2001 to 2006) and subsequently to the Human Rights Council (starting in 2007):

In other words, asserting the right to adequate housing means fighting for the inclusion of society's most vulnerable persons by compelling States to fulfill their legal obligation to guarantee a life in dignity for all. In particular, this involves challenging forced eviction, prohibited in international law but affecting millions of persons every year.

A. Definition and Content of the Right to Adequate Housing

For the ***CESCR***, the main United Nations body entrusted with overseeing the realization by States of this right, "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[453]

Housing is in conformity with international law if certain minimum elements are guaranteed at all times:[454]

- legal security of tenure, including legal protection from expulsion;
- availability of services, materials, facilities and infrastructure, including access to drinking water and sanitation;
- affordability, including for the poorest, through housing allowances and protection from excessive rents;
- habitability, including protection from cold, humidity, heat, rain, wind and disease;

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https://www.ohchr.org/en/special-procedures/sr-housing/annual-thematic-reports

[453] CESCR, *General Comment No. 4* on the right to adequate housing, 13 December 1991, § 7.

[454] Ibid., § 8.

- accessibility for disadvantaged groups, including the elderly, children, the physically disabled and victims of natural catastrophes;
- location, e.g. distant from sources of pollution but near health services and educational institutions.

The Committee insists on the prohibition of forced eviction. In its *General Comment No. 7*, it defined forced eviction as:

> *"the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".*[455]

The Committee views forced evictions as incompatible with the obligations enshrined in the ICESCR: "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[456]

In the view of the ***United Nations Special Rapporteur on the Right to Adequate Housing***,[457] "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."[458]

The Special Rapporteur emphasizes that the realization of the right to adequate housing is inseparable from the realization of other basic human rights, such as the right to life; the right to protection of one's private life, one's family and one's home; the right to be free from inhuman or degrading treatment; the right to land; the right to

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455 CESCR, *General Comment No. 7*: The right to adequate housing – (Art. 11(1) of the Covenant): Forced evictions, 20 May 1997, § 3.

456 Ibid., § 1.

457 Miloon Kothari (2000-2008), Raquel Rolnik (2008-2014), Leilani Farha (2014-2020), Balakrishnan Rajagopal (since May 2020).

458 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, E/CN.4/2001/51, 25 January 2001 §8.

food; the right to safe water; the right to health. The Special Rapporteur further insists that this realization is inextricably bound up with the respect of the fundamental principles of non-discrimination and gender equality.[459]

Pursuant to the work of the CESCR, the Special Rapporteur drafted indicators for the right to adequate housing[460] and criteria for their implementation. These are: 1. security of tenure; 2. public goods and services; 3. environmental goods and services (including land and safe water); 4. affordability (including access to financing); 5. habitability; 6. accessibility (physical); 7. location; 8. cultural appropriateness; 9. freedom from dispossession; 10. information, capacity and capacity building; 11. participation and self-expression; 12. resettlement; 13. safe environment; 14. security (physical) and privacy.[461]

In several reports, the Special Rapporteur on the Right to Adequate Housing has emphasized the prohibition on forced evictions[462] and the obligation to assist the homeless.[463] The Special Rapporteur has also drafted ***Basic principles and guidelines on development-based evictions and displacement***,[464] which

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459 See the annual thematic reports by the Special Rapporteur on the right to housing, https://www.ohchr.org/en/special-procedures/sr-housing/annual-thematic-reports; see also *Women and the Right to Adequate Housing*, (New York & Geneva: United Nations Human Rights, Office of the High Commissioner, 2012): https://www.ohchr.org/sites/default/files/Documents/publications/WomenHousing_HR.PUB.11.2.pdf.

460 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Annex II, A/HRC/4/18, 5 February 2007.

461 Report of the Special Rapporteur, E/CN.4/2003/5, 3 March 2003.

462 See E/CN.4/2005/48. See also *Forced Evictions and Human Rights*, United Nations High Commissioner for Human Rights, Fact Sheet No. 25/Rev.1, May 2014, https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-25-rev-1-forced-evictions-and-human-rights

463 See E/CN.4/2005/48.

464 See A/HRC/4/18, presented to the 4th session of the Human Rights Council.

complement the ***Guiding Principles on Internal Displacement due to armed conflict and natural disasters***.[465]

Among other subjects dealt with by the Special Rapporteur, one might mention: the situation of the homeless and the landless; impact of global warming on the realization of the right to adequate housing; mega-events and their effect on the right to adequate housing; migrants' right to adequate housing; the right to adequate housing in the event of a natural disaster; guiding principles on security of tenure for the urban poor; financialization of housing and its effect on the right to adequate housing.[466]

According to the United Nations Human Settlements Programme (***UN-Habitat***)[467] and the Global Strategy for Shelter,[468] the notion of "adequate housing […] means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost."[469]

It is worth recalling the three world conferences organized by the United Nations, in Vancouver (1976), in Istanbul (1996) and in Quito

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[465] See also Melik Özden, *Internally displaced persons*, (Geneva: CETIM, 2007): https://www.cetim.ch/product/internally-displaced-persons/.

[466] See Annual thematic reports of the Special Rapporteur on adequate housing, https://www.ohchr.org/fr/special-procedures/sr-housing/annual-thematic-reports-special-rapporteur-adequate-housing.

[467] In 2002 the UN Commission on Human Settlements became the Governing Council of the United Nations Human Settlements Programme, and was then renamed "UN-Habitat", while also being placed under the authority of the General Assembly. See General Assembly resolution A/RES/56/206, adopted 21 December 2001.

[468] The Global Strategy for Shelter was officially launched on 16 February 1989 in New York at United Nations headquarters with the goal "to facilitate adequate shelter for all by the year 2000"; General Assembly Resolution 43/1818, 20 December 1988.

[469] First report of the Commission on Human Settlements on the implementation of the Global Strategy for Shelter to the year 2000, A/43/8/Add.1, 6 June 1988, § 2.

(2016), during which declarations and action plans were adopted with the aim of remedying the world's housing problems.

B. Pertinent International and Regional Norms

The right to adequate housing is recognized in numerous international[470] and regional norms.

1. At the International Level

The right to adequate housing was recognized for the first time at the international level in 1948, in the ***Universal Declaration of Human Rights***. In this declaration, the States parties proclaim:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (Article 25)*

In 1966, almost 20 years after the Universal Declaration, States adopted the ICESCR, wherein they recognized in particular the right to adequate housing. In Article 11, the States parties committed themselves to taking the necessary measures to realize:

> *… the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

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[470] On the recognition of the right to adequate housing at the international level: https://www.ohchr.org/en/special-procedures/sr-housing/international-standards; also: Fact Sheet No. 21 (Rev. 1): The Human Right to Adequate Housing: https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-21-rev-1-human-right-adequate-housing.

The same year, the States parties adopted the International Covenant on Civil and Political Rights, in which they recognized the right to life (Article 6), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7) and the right to not be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence (Article 17).

The first common article of the two covenants apply to all peoples, including peoples living in "Non-Self-Governing and Trust Territories" as well as ***indigenous and tribal peoples***. The right to adequate housing of indigenous and tribal peoples is also recognized through the right to land, enshrined in ***ILO Convention 169*** regarding indigenous and tribal peoples (Article 16).

It should be noted that the right to adequate housing applies to every person, without discrimination. This basic principle was enshrined in the ***International Convention on the Elimination of All Forms of Racial Discrimination*** (art. 5.e.iii).

The ***Convention on the Elimination of All Forms of Discrimination against Women*** recognized the right of rural women to adequate housing. According to Article 14.2.h, States committed themselves to taking all appropriate measures to eliminate discrimination against women in rural areas in order to ensure the right :

> *to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.*

In the ***Convention on the Rights of the Child***, States committed themselves to helping parents and other persons in charge of the child, in particular through adequate housing. Article 27.3 provides that:

> *States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others*

responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.

In The ***United Nations Convention on the Rights of Persons with Disabilities***, States recognized the right of the disabled to adequate housing (Art. 28.1).

The right of refugees to adequate housing was recognized in the ***Convention relating to the Status of Refugees*** (1951) in Article 21, which states:

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, not less favorable than that accorded to aliens generally in the same circumstances.

The right to adequate housing of migrant workers and their families – ever more numerous[471] – is enshrined in Article 43 (1) of the International ***Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***. Under this convention,

Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to: […] (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents.

In addition to the three international human rights protection treaties, States have recognized the right to adequate housing and committed themselves to realizing it in many international declarations, for example in the 1976 ***Vancouver Declaration*** adopted

[471] According to the International Organization for Migration (IOM), the number of migrants in 2020 was 281 million, https://worldmigrationreport.iom.int/wmr-2022-interactive/?lang=EN.

by the United Nations Conference on Human Settlements, in which States agreed that:

> *Adequate shelter and services are a basic human right which places an obligation on Governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programs of self-help and community action. Governments should endeavor to remove all impediments hindering attainment of these goals. Of special importance is the elimination of social and racial segregation, inter alia, through the creation of better balanced communities, which blend different social groups, occupation, housing and amenities. (Section III.8)*

While reaffirming the legal status of the right to adequate housing, the heads of State and government, meeting in Istanbul (Turkey) in 1996 on the occasion of the second ***United Nations Conference on Human Settlements – Habitat II***, adopted a declaration in which they committed themselves, among other things to:

> *ensuring adequate shelter for all and making human settlements safer, healthier and more livable, equitable, sustainable and productive (§ 1).*

And they promised:

> *the full and progressive realization of the right to adequate housing as provided for in international instruments. To that end, we shall seek the active participation of our public, private and non-governmental partners at all levels to ensure legal security of tenure, protection from discrimination and equal access to affordable, adequate housing for all persons and their families (§ 8).*

The third ***United Nations Conference on Human Settlements – Habitat III***, held in Quito (17-20 October 2016), adopted a declaration on "sustainable cities and human settlements for all". This declaration was subsequently endorsed by the UN General

Assembly at its 71st session.[472] It states that cities and human settlements should, inter alia:

> *fulfill their social function, including the social and ecological function of land, with a view to progressively achieving the full realization of the right to adequate housing as a component of the right to an adequate standard of living, without discrimination, universal access to safe and affordable drinking water and sanitation, as well as equal access for all to public goods and quality services in areas such as food security and nutrition, health, education, infrastructure, mobility and transportation, energy, air quality and livelihoods (§ 13.a).*

Besides the recognition of the right to adequate housing, many international declarations have accentuated the prohibition of forced expulsions, characterized as "flagrant violations of human rights" by the Commission on Human Rights in 1993.[473]

In Agenda 21 adopted in 1992 at the ***United Nations Conference on Environment and Development***, States declared that:

> *the right to adequate housing [is] a basic right […] People should be protected by law against unfair eviction from their homes or land (§§ 7.6 and 7.9.b)*

The ***Declaration on the Rights of Indigenous Peoples*** (2007) specifies that indigenous people may not be removed by force from their lands and territories (Art. 10) and that they have the right to define and establish priorities and strategies for the improvement and use of their lands and territories and other resources (Art. 32).

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** (2018)[474] enshrines the right to

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[472] General Assembly resolution A/RES/71/256, adopted on 23 December 2016.

[473] Commission on Human Rights, Resolution 1993/77, 10 March 1993.

[474] See in this regard, Coline Hubert, *The UN Declaration on the Rights of Peasants* (Geneva: CETIM, 2019); also Training sheets on peasants' rights: https://www.cetim.ch/factsheets-on-peasants-rights/ .

adequate housing for these persons in order that they may live within their communities in peace and dignity and without discrimination (Art. 24). States' primary obligation regarding this right is to refrain from arbitrarily or illegally evicting people from their homes and their land. If eviction is inevitable, for example in the case of public interest, it is imperative that it be accompanied by proper compensation (Art. 24.3).

In *General Recommendation No. 34* (2016) on the rights of rural women, the ***Committee on the Elimination of Discrimination against Women*** required States parties to "*address housing as part of overall rural development and ensure that measures are developed in consultation with rural women*." It also affirms that these efforts "*should contain strong measures to protect rural women effectively from forced eviction by State and non-State actors*."[475] "*States parties that have entered reservations should provide information in their periodic reports to the Committee on the specific effects of such reservations on the enjoyment by rural women of their rights, as set out in the Convention, and indicate the steps taken to keep those reservations under review, with a view to withdrawing them as soon as possible.*" (§ 96)

2. At the Regional Level

The ***European Social Charter*** very explicitly protects the right to adequate housing in Article 31:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources.

In its Article 8, the ***European Convention on Human Rights*** enshrines the right to respect of private and family life and of the home.

[475] CEDAW/C/GC/34, 7 March 2016, § 80.

The ***African Charter on Human and Peoples' Rights*** does not explicitly recognize the right to adequate housing, but several other recognized rights, such as the right to health (Art. 16) and the right of all people to a general satisfactory environment and favorable to their development (Art. 24), can be interpreted as protecting the right to adequate housing. However, the Charter requires that the African States fulfill the right to adequate housing that they have recognized at the international level, including by accepting the ICESCR (Art. 60 of the African Charter). Thus, all States that have accepted the African Charter and the Covenant have committed themselves to taking measures to fulfill the right of their population to adequate housing.

The ***African Charter on the Rights and Welfare of the Child*** explicitly mentions housing. States that have accepted it have committed themselves, according to their means, to taking all appropriate measures to assist parents or other persons responsible for the child and to provide in case of need programs of aid and support, especially regarding adequate housing. (Art. 20)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is also very explicit, particularly in Article 16:

> *Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.*

Its Article XX protects women's right to inherit housing.

> *A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.*

The ***Protocol of San Salvador*** is intended to complement the 1969 ***American Convention on Human Rights***. However, its protection of the right to adequate housing is limited, protected in the Americas only through the recognition of the right of everyone to live in a healthy environment and to benefit from essential collective facilities (Art. 11).

C. States' Specific Obligations regarding the Right to Adequate Housing

Although many countries have included the right to adequate housing in national legislation, in practice invoking this right before the courts can be difficult, for States have used a range of methods to recognize the right to adequate housing at the national level.

First, there is the recognition of the right to adequate housing in the constitution as a basic human right. This is the case in several countries.[476] In this ideal case, every person victim of a violation of the right to housing can appeal to a court to assert this right (see examples of implementation below.)

Second, there is the recognition of the right to adequate housing in the constitution as a principle, a goal or an essential social or political aim of the State. This too is the case in many countries.[477] In these countries, the State has the political duty to improve, through its policies and programs, the population's access to housings, including for the destitute. But recourse to the courts on this basis alone can be difficult in the event of a violation. Since most countries have ratified the ICESCR, they are under obligation to enshrine the

[476] Armenia, Belgium, Burkina Faso, Congo, Ecuador, Equatorial Guinea, Guyana, Haiti, Honduras, Mali, Mexico, Nicaragua, Paraguay, Russia, Sao Tomé-et-Principe, Seychelles, South Africa, Spain, Venezuela.

[477] Argentina, Bahrain, Bangladesh, Colombia, Costa Rica, Dominican Republic, Finland, Greece, Guatemala, India, Iran, Italy, Nepal, Netherlands, Pakistan, Panama, Peru, Philippines, Poland, Slovenia, South Korea, Sri Lanka, Suriname, Switzerland, Turkey.

right to adequate housing in their national legislation, thereby enabling their citizens to invoke it in the national courts.

Third, there is the recognition of the right to adequate housing as an integral part of other basic rights guaranteed by the constitution, as for example the right to life or the right to a minimum standard of living. In most countries, the right to life is recognized as a basic right in the constitution. It is also possible that this right is interpreted broadly by the courts and oversight bodies as including protection of the right to housing. This is the case, for example in ***India*** and ***Bangladesh***, where the right to life has been interpreted very broadly by the Supreme Court. The Indian Court holds that the right to life comprises in particular the protection of the right to health, to water, to adequate housing, to food and to the environment.[478]

Fourth, the right to adequate housing can be recognized in ordinary legislation, for example in a national law on housing.

The obligation to ***respect*** the right to adequate housing implies that States must refrain from all arbitrary measures that impede the exercise of this right. This is a negative obligation, prohibiting the State from exercising its power when this would result in undermining already existing access to adequate housing. For example, a government violates this obligation when it decides to evict persons – whatever their legal status – from their homes by force, without warning or judicial recourse. A State also violates this if it limits the right of association of tenants or of rural communities holding housing in common.

During armed conflict, this obligation signifies that government troops must not destroy civilian housing; nor may they impede

[478] Nour Mohammad & Sayed MM Hasan, "Judicial Enforceability of Economic, Social and Cultural Rights in Bangladesh: A Critical Evaluation", Asia-Pacific Journal on Human Rights and the Law, 16 February 2022: https://doi.org/10.1163/15718158-23010003.

rescue operations intended to provide refuge to displaced persons or refugees.

The obligation to ***protect*** the right to housing requires that States prevent third parties from impeding in any way the exercise of this right. This can involve individuals, business enterprises or other entities. For example States must enact laws to protect the population from land and property speculation, create bodies to investigate violations, and ensure means of redress for victims, especially before the courts. The State must also intervene when powerful private parties or business enterprises evict people from their land or their homes, by prosecuting those responsible and guaranteeing compensation to the victims.

The Special Rapporteur on the Right to Adequate Housing, in several reports, has denounced the negative effects of the privatization of public services.[479] He emphasizes that the State has the obligation to guarantee that, for example, the privatization of water will have no negative effects on the population's access to water and adequate housing. Yet, this privatization has very often entailed price increases that made water unaffordable for the poorest. In Manila (***Philippines***), for example, after the privatization of the water service carried out by *Lyonnaise des Eaux*, the price of water quadrupled from 1997 to 2003.[480] In all cases of privatization of public services, including water and electricity, the State must continue to guarantee the right to adequate housing, including for the poorest.

The State must also intervene to prevent all discrimination (such as based on sex, nationality, ethnic or social origin) in access to housing. Failing to do so constitutes a violation of its obligation to protect the right to adequate housing.

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[479] https://www.ohchr.org/en/special-procedures/sr-housing/annual-thematic-reports.

[480] E/CN.4/2004/10, §40.

The obligation to ***implement*** comprises the obligations to *facilitate* and to *fulfill* the right to adequate housing. The obligation to *facilitate* requires States to take positive measures to help individuals and communities to exercise their right to housing. For example, the State must build sufficient low-cost housing and guarantee that the poorest have access to it through subsidies.

The obligation to *fulfill* implies that the State guarantees temporary housing for all persons in extreme need. In the event of armed conflict or natural disasters, special attention should be given to women, children, the internally displaced and refugees.

The obligation to *implement* requires that States adopt necessary legislation, that they draft a plan of action for housing at the national level and that they guarantee that housing is adequate, available and accessible to all, including in rural areas and in the most vulnerable urban areas.

A State in which a great number of persons are deprived of access to minimum housing, or at least temporary shelter, is in violation of its obligation to realize the right to housing. The poorest countries, if they do not have sufficient resources to respect this minimum obligation, must request international cooperation.

Just as the poorest States have the obligation the request international cooperation to realize the right to adequate housing, rich States have the obligation to respond to the appeal. They have committed themselves to doing so by joining the United Nations and by ratifying the ICESCR, which provides that States must act, either through their own efforts or through ***international assistance and cooperation***, to the maximum of available resources, to realize economic, social and cultural rights, hence the right to adequate housing (Art. 2.1).

In 1991, in General Comment No. 4 on the right to adequate housing, the CESCR described the international dimension of the obligations of States parties to the ICESCR:

> *Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and view of the affected groups.*[481]

D. Examples of Implementation

1. At the National Level

Ms. Grootboom and Others,[482] including several children, lived in deplorable conditions and for seven years had been waiting for low cost housing from the municipality of Oostenberg, in the province of Cape Town in ***South Africa***. As no State aid was forthcoming, they decided to illegally occupy a private property. The owner filed a complaint and obtained an eviction order. *Ms. Grootboom and Others* were evicted and took refuge on an athletics field with no protection against the winter that was setting in. A lawyer took up their defense

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[481] CESCR, *General Comment No. 4*, 13 December 1991.

[482] Constitutional Court of South Africa, The Government of the Republic of South Africa, the Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality versus Irene Grootboom and others. Case CCT 11/00. Judgment of 4 October 2000: www.escr-net.org/usr_doc/Grootboom_Judgment_Full_Text_(CC).pdf

and wrote to the municipality asking that it fulfill its constitutional obligation and supply adequate housing for these persons. With no response from the municipality, *Ms. Grootboom and Others* took the case to the High Court of the province of Cape Town. The Court ordered the municipal authorities the supply these persons with minimum housing. Instead of obeying the Court order, the political authorities concerned (the federal government and those of the province and the municipality) appealed the case to the Constitutional Court.

The South African Constitutional Court in its ruling of 4 October 2000 began by reaffirming the right of the entire South African population to adequate housing, as recognized in the national constitution. It then examined the situation of *Ms. Grootboom and Others* and the South African government's housing policy, concluding that the latter was inadequate, in particular because it did not provide any short-term measures to assist the poorest. The Court thus ordered that *Ms. Grootboom and Others* receive immediate assistance, that the national housing policy be revised and that a greater portion of the budget be attributed to this policy to alleviate, without delay, the housing conditions of the poorest.

In **India**, the Supreme Court for many years has recognized the right to life as including the right to adequate housing and the right to protection from forced eviction. According to the Supreme Court: *The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in […] for a human being it [adequate housing] has to be a suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual. […] Since a reasonable residence is an indispensable necessity*

for fulfilling the Constitutional goal in the matter of development of man and should be taken as included in 'life' in Article 21 […]. [483]

It is on the basis of this interpretation of the right to life that Indian organizations have been able to file complaints directly before the Supreme Court to contest forced evictions planned by public powers. In a case in Bombay for example, the Supreme Court obliged the public powers to guarantee to rehouse 50 families threatened with eviction, as an essential condition for the State's respect of the constitution.[484]

Cases have also been litigated in the ***United States***, where the public powers have been obliged to guarantee decent shelter to all the homeless requesting it. In one case that went to the New York Supreme Court in 1979, the Court recognized that the State of New York's constitution and the law on social services guaranteed the right to decent shelter for all persons in need. The Court ruled that this right implied an obligation for the City of New York to provide such shelters in sufficient numbers.[485] Since this ruling, measures criminalizing the homeless and numerous cases of litigation have ensued. Nonetheless, the ruling stands and continues to uphold the right to shelter.[486]

2. At the Regional Level

In 2001, two NGOs[487] filed a complaint with the ***African Commission on Human and Peoples' Rights*** to defend the Ogoni people from the national oil company and the transnational

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483 Supreme Court of India, *Shanti Star Builders v. Naryan Khimalal Totame & Others*, 1990, Civil Appeal No. 2598 of 1989, §§9, 13.

484 Supreme Court of India, *Ram Prasad v. Chairman, Bombay Port Trust*, judgment rendered 19 March 1989.

485 New York State Supreme Court, *Callahan v. Carey*, 1979.

486 For more information, see: https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/protecting-the-legal-right-to-shelter/.

487 A Nigerian NGO (the Action Center for Economic and Social Rights) and an American NGO (the Center for Economic and Social Rights).

corporation Shell for violating their right to adequate housing and food in ***Nigeria***.[488] The two oil companies, with the active complicity of the government and with total impunity, were destroying the Ogoni's lands, housing and water resources. In this case and for the first time, the African Commission concluded that the government of Nigeria had the obligation to respect and protect the Ogoni's right to adequate housing, including against the activities of the oil companies, both national and transnational. In the Commission's view, *"every person is entitled to a certain degree of security that guarantees legal protection against eviction, harassment and other threats."*

Neither the ***Inter-American Commission*** nor the ***Court of Human Rights*** may receive individual or collective complaints regarding violations of the right to adequate housing. The States of the Americas have not provided for this possibility. Only civil and political rights protected by the American Convention on Human Rights can be invoked before the Commission and the Court. The only means for victims of violations of the right to housing to appeal to these bodies is thus to prove that their civil or political rights have been violated. This is what, for example, 142 families from the Mayagna (Sumo) Awas Tingni communities on the Atlantic coast of ***Nicaragua*** managed to do. These families complained that the government was planning to sell part of their lands to a private company with no right of appeal and without having consulted them. The families also demanded that the government carry out demarcation of their ancestral lands and guarantee their right to property, to land and to adequate housing. Accepting the argument of the indigenous families, the Inter-American Court of Human Rights ruled that the Nicaraguan government had violated their rights to property and to legal protection. It ordered that their

[488] African Commission on Human and Peoples' Rights, 155/96 *The Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, 2001: www1.umn.edu/humanrts/africa/comcases/155-96b.html; also E/CN.4/2004/48, 11 February 2004.

ancestral lands be demarcated and that the government protect them from future violations of their rights to property and housing.[489]

Complaints arising from the right to adequate housing have been filed with the ***European Committee of Social Rights***. In a case concerning ***Greece***, the Committee found against the government for having deprived migrant children of their right to adequate housing (a violation of Article 31 of the Revised European Social Charter). The Committee ruled that there was a systematic problem of overpopulation in the five shelters and identification centers on the islands of Chios, Kos, Leros, Lesbos and Samos. At the time of the visit to Greece of the Council of Europe's Commissioner for Human Rights in June 2018, 11,500 persons were lodged in these centers whose total designated capacity was 6,246 persons. The Committee also ruled that the exceptional character of the situation resulting from the increasing flow of migrants and refugees and the difficulties experienced by a State trying to control its borders did not absolve that State from its obligation, under Article 31.2 of the Charter, to provide shelter to migrants and refugee children, given their particular needs and extreme vulnerability, nor did it limit or diminish in any way the State's responsibility under the Charter.[490]

A complaint filed in 2011 with the Committee concerning ***France*** alleged that Roma migrants (mainly from Romania and Bulgaria) living in France in a State of abject poverty were victims of forced evictions from camps and of mass deportations, following the French President's announcement in July 2010 of a more repressive policy on the Roma. The Committee found against France for, inter alia,

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[489] Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001: https://www.escr-net.org/caselaw/2006/case-mayagna-sumo-awas-tingni-community-v-nicaragua-eng

[490] International Commission of Jurists and European Council for Refugees and Exiles v. Greece, Complaint 173/2018, https://hudoc.esc.coe.int/eng/?i=cc-173-2018-dmerits-en

violation of Article E (non-discrimination) combined with Article 31 (right to adequate housing) of the Charter.[491]

In Europe, the victims of violations of the right to adequate housing must prove violation of their civil and political rights in order to have access to judicial redress. This was the course taken by the inhabitants of the village of Kelekçi (Turkish Kurdistan) whose houses were burned down by the Turkish armed forces on 10 November 1992, after which the entire village was evacuated by force. Notwithstanding the denials of the Turkish government, the ***European Court of Human Rights*** found against ***Turkey*** for violation of the right to respect for private life and home, guaranteed by Article 8 of the European Convention on Human Rights. Turkey was ordered to pay financial compensation to the victims.[492]

In another case concerning the forced expulsion of Greek Cypriots from their homes and lands in Northern Cyprus (following the occupation by the Turkish army in 1974), Turkey was found guilty on the same basis for the forced expulsion of these populations and for its refusal to guarantee them a right to return to their homes and villages.[493]

3. At the International Level

The ***United Nations Special Rapporteurs on the Right to Adequate Housing*** have so far visited 34 countries. During these missions, they have met not only with the countries' authorities but also with representatives of social movements and NGOs, both in the capital and on the ground, after which they have presented mission reports[494] to the Human Rights Council (the former Commission on

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491 See *Médecins du Monde – International v. France*, Complaint No. 67/2011 https://hudoc.esc.coe.int/eng?i=cc-67-2011-dmerits-en

492 European Court of Human Rights, *Akdivar v. Turkey*, 16 September 1996.

493 European Court of Human Rights, *Cyprus v. Turkey*, 10 May 2001.

494 All the Special Rapporteur's mission reports are available at: https://www.ohchr.org/en/special-procedures/sr-housing/country-visits

Human Rights) on compliance with the right to adequate housing in each of the countries visited, with numerous recommendations addressed to the governments of these States.

The Special Rapporteurs have also sent several hundreds of urgent communications to governments with regard to specific violations of the right to adequate housing, including *"forced evictions, home demolitions, homelessness, cuts to housing assistance programmes, development-based displacements, privatization of public housing or water services, the housing rights of indigenous peoples, refugees, migrants, women, Roma, religious minorities and other groups, and environmental and health hazards affecting the adequacy of housing."*[495]

While the interventions of the Special Rapporteur have made it possible to prevent a certain number of violations of the right to adequate housing, the final tally remains mixed after 20 years of work in favor of this right:

> *Of the 385 communications sent by the successive Special Rapporteurs on housing, 226 received replies, yielding a response rate of about 59 per cent. The quality of replies varies greatly, from mere letters acknowledging receipt of the communication to detailed substantive replies. One of the few studies carried out to date on the effectiveness of the communications procedure of all the special procedure mechanisms has indicated that only 8 per cent of all replies received indicated steps taken to address a violation. Some 42 per cent of all replies were substantive, but incomplete, 26 per cent merely rejected the allegation of a violation and 24 per cent provided information that was not directly relevant to the alleged violation, for example information on general policies or laws, without relating them to the particular*

[495] See: *Twenty years of promoting and protecting the right to adequate housing: taking stock and moving forward* – Report of the Special Rapporteur on the right to adequate housing, A/HRC/47/43, 12 July 2021, § 37.

concern raised. Those findings roughly mirror the observations of the current Special Rapporteur.[496]

In a recent decision, the ***CESCR*** ordered compensation from ***Spain*** for the harm caused by the eviction of a Ms. López and her children from their home. The Committee found that the eviction, a measure whose proportionality had not been examined by the authorities, constituted a violation of the right to suitable housing. The Committee requested the Spanish State to grant effective reparation to Ms. López and her children, including the allocation of public housing, compensation for the violations suffered and reimbursement of the court costs involved in the procedure.[497] In this ruling, the Committee also reminded Spain of its obligation to ensure that its legislation and its enforcement of the laws were in accordance with the obligations in the ICESCR so that similar violations would not happen in the future (guarantee of non-repetition).[498]

The ***United Nations Committee on the Elimination of Racial Discrimination*** has often evoked the matter of housing as one of the areas where States act in a discriminatory fashion or do not protect their populations against discriminatory acts by third parties. Discrimination against indigenous populations is a common subject that the Committee has addressed in several of its concluding observations to Latin American States, as well as to Australia, New Zealand, Sudan, and the Philippines.[499] The Committee has also found violations of the right to adequate housing in several cases of individual complaints, including in a case in the Netherlands, where the arrival of a foreigner in an apartment in Utrecht provoked very

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496 Ibid., §39.

497 See *Maribel Viviana López Albán v. Spain*, Communication No. 37/2018, E/C.12/66/D/37/2018, 29 November 2019.

498 See also E/C.12/69/D/54/2018.

499 E/CN.4/2004/48.

violent xenophobic reactions by people in the neighborhood, without any protection measure being taken by the State.[500]

The ***United Nations Committee against Torture*** has also protected the exercise of the right to adequate housing by construing several cases of forced eviction, in the context of its work, as amounting to torture or cruel, inhuman and degrading treatment or punishment. For example, in its concluding observations on ***Israel*** in 2001, the Committee concluded that the home demolition policies in the Occupied Palestinian Territory represent in many cases a cruel, inhuman or degrading punishment or treatment.[501] Forced evictions several times have also been construed as constituting cruel, inhuman and degrading treatment in individual complaints examined by the Committee. In the case of the forced eviction and the destruction of several houses belonging to Roma families in ***Montenegro***, burned down by hundreds of demonstrators in the presence of the police, who failed to react, the government of ***Serbia*** and Montenegro was found guilty of failing to protect the attacked families.[502]

Urbanization and the Right to Adequate Housing

The development of huge urban centers is the dominant feature of urbanization. Starting in the 1950s, chaotic urbanization has spread across the world to such an extent that more than half of humanity now lives in urban centers, very often in deplorable conditions.

This urbanization is the product of liberal globalization and rural exodus. Profit-driven, the urban infrastructure and services

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500 Committee on the Elimination of Racial Discrimination, Communication No. 4/1991, CERD/C/42/D/4/1991.

501 CAT/C/XXVII/Concl.5.

502 Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, CAT/C/29/D/161/2000.

it offers are intended to attract investors, promising high levels of productivity and ensuring socio-spatial surveillance. In the countries of the Global South, the various, economic, technical and political challenges that their cities face are above all the result of unregulated urbanization.

While it is broadly recognized that cities, especially the biggest, are motors of economic growth, it is worth questioning their role and the consequences of this new deal in today's societies. Urban concentration and its concomitant concentration of capital have upset town-country relations and more generally the relationship between towns and regions. It produces new urban forms, which in turn produce ever greater inequality in the distribution of wealth: private towns and luxurious condominiums exist side by side with slums. Attempts at exploiting the urban landscape to make it serve the free market aim to remove its essential social dimension. Urban dwellers have become mere economic agents and need to reassert their status as citizens.

It is in this context that a worldwide citizen's movement has emerged to combat the social, political, economic and environmental inequalities generated by this system. In the early 2000s, urban social movements launched a campaign for the "right to the city".

At the Social Forum of the Americas (Quito, July 2004) and at the World Urban Forum (Barcelona, September 2004) social movements drafted a World Charter for the Right to the City[503] in which democratic management of the city (Art. II.1) is demanded, and a chapter is devoted to the right to housing (Art. XIV).

Since then, the social movements involved have created a Global Platform for the right to the city[504] and have continued to

[503] World Charter for the Right to the City - Right to the city (right2city.org).

[504] https://www.right2city.org/the-platform/.

mobilize, especially at social forums and the conferences of the United Nations Human Settlements Programme (UN-Habitat).

At the European level, on 18 May 2000 in Saint-Denis (France), dozens of mayors of European cities adopted a "European Charter for the Safeguarding of Human Rights in the City."[505]

At the global level, a network of cities, local, regional and metropolitan governments and their associations (United Cities and Local Governments - UCLG) was created in 2004 in Paris[506] and has worked especially to put the right to the city at the center of territorial and urban governance.[507]

The United Nations Special Rapporteur on the Right to Adequate Housing has examined practices in certain cities influencing living and housing conditions, in particular those for the poor. Herewith several examples.

In Porto Alegre (Brazil) at the beginning of the 2000s, the creation by the municipality of a participatory budget "has not only made a marked difference in living conditions but, more importantly, has had an empowering effect on the poor".[508] Although the participatory budget was weakened by subsequent administrations, it remains an interesting and concrete experiment worth developing.

"In Montevideo, pro-poor policies and programmes adopted by the city, without central government support and despite an economic downturn, have led to closing the precipitous gaps between low-income groups and the rest of the city's population, including by: extending sanitation to over 90 per cent of residences; providing public transportation to all of the city's

505 https://uclg-cisdp.org/en.

506 UCLG - United Cities and Local Governments.

507 The Bogotá Commitment and Action Agenda, 15 October 2016: Bogotá UCLG Commitment and Action Agenda (2016) | CISDP (uclg-cisdp.org).

508 E/CN.4/2003/5, 3 March 2003, § 49.

peripheral settlements; purchasing over 220 hectares of centrally located urban land and allocating them for construction of low-income housing; and establishing low-cost material banks and technical assistance centers."[509]

"In the run-up to the 2017 gubernatorial elections in Jakarta, civil society negotiated a 'political contract' with one of the candidates that included a demand for a human rights-based housing strategy inclusive of urban plans to regularize 'kampungs' (informal settlements) and an affordable housing programme. Many voters turned out from the kampungs to support the candidate and the contract is being implemented."[510]

Real Estate Speculation

For several decades, real estate speculation in major Western cities has been an obstacle to the right to adequate housing. Even cities with zoning regulations, such as Brussels, Geneva, London, New York and Paris, are not spared from this phenomenon. Real estate speculation is also spreading into the major cities of the countries of the Global South.

Real estate speculation has reached such an extent that, in 2007/2008, it triggered in the United States and in Europe in particular, the loss of housing for several million households and a banking crisis. In the wake of the bankruptcy of one of the world's leading investment banks (Lehman Brothers), the North American and European authorities were called upon to provide several trillion dollars/euros of public money to save their banking sectors. The impact of this crisis at the economic and social level continues to be felt today, given that the bailout of the banking sector led to soaring budget deficits, public debt and cuts

509 Ibid.

510 A/HRC/37/53, 15 January 2018, § 72.

in funding for public services such as health, education and social housing.

In his report on the financialization of housing, the Special Rapporteur analyzed this phenomenon as follows: *The 'financialization of housing' refers to structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets. [...] It refers to the way housing and financial markets are oblivious to people and communities, and the role housing plays in their well-being.*[511]

The Special Rapporteur deplores the role of the housing and real estate markets, which "have been transformed by corporate finance, including banks, insurance and pension funds, hedge funds, private equity firms and other kinds of financial intermediaries with massive amounts of capital and excess liquidity. The global financial system has grown exponentially and now far outstrips the so-called real 'productive' economy in terms of sheer volumes of wealth, with housing accounting for much of that growth. […] The value of global real estate is about US$ 217 trillion, nearly 60 per cent of the value of all global assets, with residential real estate comprising 75 per cent of the total."[512]

The Special Rapporteur exhorts States to "ensure that all investment in housing recognizes its social function and States' human rights obligations in that regard" and recommends that the realization of the "the New Urban Agenda should include a full range of taxation, regulatory and planning measures in order to re-establish housing as a social good, promote an inclusive housing system and prevent speculation and excessive accumulation of wealth".[513]

511 A/HRC/34/51, 18 January 2017, § 1.
512 Ibid., §§ 2, 3.
513 Ibid, § 77.

> The Special Rapporteur also drafted Guiding principles on security of tenure for the urban poor. They propose, inter alia, that States "allocate available public land for the provision of low-income housing; adopt measures to combat speculation and under-utilization of private land, housing and buildings".[514]

[514] A /HRC/25/54, 30 December 2013, art. 4.

CHAPTER 5

THE RIGHT TO WORK AND ITS COROLLARIES

Work is essential for each person in the current organization of society. It not only contributes to the development of the individual but is also necessary for everybody in providing for one's needs and those of one's family, to create and maintain social ties and to fulfill one's duties to society.

In our times, however, for millions of persons work has become a rare experience; and an ordeal or danger for those who have "the good luck" to be employed. Worse, in our times, millions of persons work in conditions tantamount to slavery.

According to the most recent figures (2022) of the International Labor Organization (ILO), each year there are some 360 million workplace accidents from which almost 2 million persons die;[515] 28 million persons are victims of some form of forced labor, debt bondage, human trafficking and other contemporary forms of slavery;[516] 160 million children are forced to work, half of them at a job putting their mental, physical and emotional development in danger;[517] there are more than 200 million unemployed in the world, bearing in mind that, for purposes of the ILO statistics, even one or two hours of paid work per week classifies a person as employed. It is worth noting that jobs that are insecure or in sectors euphemistically called "informal" are held by some 2 billion persons

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515 https://www.ilo.org/global/topics/safety-and-health-at-work/lang--en/index.htm

516 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_854796.pdf

517 https://www.ilo.org/topics/child-labour

– 60% of the world's working population according to 2019 statistics.[518] This means that these persons have no social insurance (e.g. unemployment compensation, paid sick leave, retirement pension). As for migrants, their numbers keep climbing (286 million in 2022, according to UN-Migration),[519] and they are confronted with numerous problems: non-respect of their basic rights, hard and insecure labor, discrimination, human trafficking (especially women and children), indeed contemporary forms of slavery.

These tendencies, in a context of multiple crises (economic, social, political, financial, energy, environmental…), are deeply disturbing for the future, given that they are sources of conflicts of all sorts and of outright war.

However, for more than a century, the ILO has been codifying labor rights (labor relations and working conditions) and drafting employment policies. These rules and regulations have made possible an indisputable improvement in working conditions in some regions of the world, in particular in Europe during the 30-year post-Second World War boom. Nonetheless, even this region has not escaped these problems, and it is in full regression.

The origin of all these problems is to be found in the organization of production and of the world's political economy. Four decades of neoliberal policies, implemented throughout the world and called globalization, have further aggravated the crisis. By setting workers as well as States in competition with each other, and by subjecting governments to the interests of transnational corporations, neoliberal globalization has produced a regression of legislation regulating labor relations and has debilitated the trade union movement.

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518 World Employment and Social Outlook – Trends 2022, p. 30, https://www.ilo.org/global/research/global-reports/weso/trends2022/lang--en/index.htm

519 https://worldmigrationreport.iom.int/wmr-2022-interactive/?lang=EN

In this context, while labor law is well known, the right to work gets short shrift. Although regulation of labor relations is extremely important, one must first have a job in order to benefit from it.

The right to work, recognized at the international level and in most national legislation, acknowledges this requirement. As a human right, it brings to the discussion of these questions a dimension which is rarely considered and which is not taken into account in the drafting of policies and strategies in the struggle against unemployment and underemployment.

A. Definition and Content of the Right to Work and Its Corollaries

While several articles of the Universal Declaration of Human Rights are devoted to the right to work and its corollaries, it is Article 25.1 that best describes the basic overall needs of everyone, including social security in the event of unemployment and other vicissitudes of life.

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*

The right to work is precisely asserted in Article 23 of the Universal Declaration and enshrined in the ICESCR. It constitutes a basic right indispensable to the exercise of other human rights and has a dual aspect, individual and collective, for it must permit the survival of both the individual and the individual's dependents as well as a collective organization necessary for the defense of this right and its corollaries.

Thus, Article 23.1 of the Universal Declaration states, "Everyone has the right to work, to free choice of employment, to just and

favorable conditions of work and to protection against unemployment."

The ICESCR, for its part, establishes "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts" (Art. 6.1).

Further, the States parties to this Covenant, while recognizing this right as an inalienable human right, commit themselves to taking appropriate measures to safeguard this right. Among these measures, the ICESCR lists:

> *technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual (Art. 6.2).*

The right to work, recognized as pertaining to everyone, implies non-discrimination regarding especially women, migrants, displaced persons, refugees, the sick, the disabled, etc. (inter alia Art. 7 of the Universal Declaration; Art. 2.2 of the ICESCR).

In the view the CESCR, the right to work includes the right

> *to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.*[520]

Further, the Committee declares that the enjoyment of the right to work necessitates the following interdependent and essential elements: a) *Availability* (within the territory of the State party, there must be specialized services whose function is to help and support

[520] CESCR, The Right to Work: General Comment No. 18, E/C.12/GC/18, 27 April 2006, § 6.

individuals in their search for employment); b) *Accessibility* (the labor market must be accessible to everyone under the jurisdiction of the State party); c) *Acceptability and quality* (the protection of the right to work has several aspects, notably the right of the worker to fair and favorable working conditions, in particular the right to security in the workplace, the right to unionize, and the right to freely choose and accept a job).

ILO Convention No. 122 sets for States the essential objective of implementing "an active policy designed to promote full, productive and freely chosen employment" (§ I.1).

The ***ILO Convention, No. 88***, requires that States parties "maintain or ensure the maintenance of a free public employment service" (Art. 1.1).

ILO Convention No. 142 on human resources development, requires States parties to

> *adopt and develop comprehensive and coordinated policies and programs of vocational guidance and vocational training, closely linked with employment, in particular through public employment services. (Art. 1)*

And ***ILO Convention No. 158*** makes the termination of employment conditional on valid reasons (Art. 4), requiring compensation for the worker in the event of unjustified termination (Art. 10).

1. The Prohibition of Slavery, Servitude and Forced Labor

The International Covenant on Civil and Political Rights prohibits slavery, servitude and forced labor (Art. 8). Forced labor is also prohibited by ILO Conventions (Conventions No. 29 and No. 105).

2. Decent Work

As required by Article 7 of the ICESCR, work must be decent, in other words, respectful of the basic rights of the human person. Workers must benefit from conditions of security in their work, remuneration permitting them and their family to live in dignity, and respect for their physical and mental integrity in the exercise of their activities.[521]

For the ILO, the concept of decent work comprises

> *the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.*[522]

3. The Right to Remuneration, Limitation of Working Hours and the right to Social Protection

The Universal Declaration of Human Rights specifies that:

> *Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (Arts 23.2 and 23.3)*

Under Article 7 of the ICESCR, the States parties

> *recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) remuneration which provides all workers, as a minimum, with: (i) fair wages and equal remuneration for work of equal value without distinction of any kind,*

521 Ibid, § 7.

522 See *The right to work*, Melik Özden, CETIM, Geneva, 2008.

in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant; … (d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The following ILO Conventions enshrine: equality of pay (Convention No. 100); minimum wages (Conventions Nos. 26, 99, 131, 135); regulation of the working hours in various sectors (Conventions Nos. 1, 30, 43, 46, 47, 49, 51, 61, 67, 153); night work (Conventions Nos. 4, 20, 41, 89); weekly rest (Conventions Nos. 14, 106); and the guarantee of paid holidays (Conventions Nos. 52, 101, 132, 140).

4. The Right to Safe and Healthy Working Conditions

The International ICESCR stipulates: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (b) safe and healthy working conditions." (Art. 7. b)

The ILO has adopted a considerable number of conventions bearing not only on the safety and health of workers (Convention No. 155), but also on protection against particular risks in certain branches of economic activity (Conventions Nos. 13, 27, 32, 62, 115, 120, 127, 136, 139, 148, 152).

5. The Right of Association and to Join Trade Unions

Article 8.1.a) of the ICESCR guarantees "the right of everyone to form trade unions and join the trade union of his choice". It is the same for "the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations" (Art. 8.1.b). The right to strike is also guaranteed (Art. 8.1.d).

The International Covenant on Civil and Political Rights also guarantees the right to association and to form unions (Art. 22), the right of assembly (Art. 21) and the right to freedom of opinion and expression (Art. 19).

Trade union freedom is at the heart of the ILO texts. Thus, many ILO conventions concern union freedom (Conventions Nos. 11, 87, 98, 135, 141, 151).

6. The Right to Social Security

The Universal Declaration stipulates that everyone is entitled to social security (Art. 22).

Under Article 9 of the ICESCR, "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance."

In this area, the ILO has adopted numerous conventions dealing with social security in general (Conventions Nos. 102, 118, 157); medical insurance coverage (Conventions Nos. 24, 25, 130) and old-age, invalidity and survivors' benefits (Conventions Nos. 35, 36, 37, 38, 39, 40, 48, 128); benefits in the event of accidents at work and occupational illnesses (Conventions Nos. 12, 17, 18, 19, 42, 121); unemployment compensation (Convention Nos. 44); and maternity benefits (Conventions Nos. 3, 103).

In its General Comment No. 19, the CESCR is explicit:

> *The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.*[523]

[523] CESCR, General Comment No. 19, E/C.12/GC/19, 4 February 2008, § 9.

The Committee further stipulates that "it should be borne in mind that social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy," and, while recognizing that the constitutive elements of the right to social security can vary in function of the situation, the Committee reckons that the following essential factors are indispensable in all circumstances: i) availability of a social security system; ii) coverage of certain risks and social contingencies (health care, sickness, old age, unemployment, work-related injury, family and child support, maternity, disability, survivors and orphans); iii) adequacy of the benefits; iv) economic and physical accessibility for all with "reasonable, proportional and transparent" admission conditions and with the participation of the beneficiaries in the system's administration, while disposing of information "on all social security entitlements in a clear and transparent manner"; v) the necessity of taking certain measures to realize the rights enshrined in the Covenant (e.g. care and protection of the child, prevention of sickness through the improvement of infrastructure and health care services, the setting-up of insurance plans for small farmers in the event of poor harvests).[524]

For further information, see the chapter devoted to social security (Part III, Chapter 6).

B. Pertinent International and Regional Norms

1. At the International Level

Besides the international norms related to the right to work already discussed, the following instruments are an integral part of the existing corpus at the international level.

[524] Ibid., §§ 10 to 28.

The ILO's 1944 ***Declaration of Philadelphia***, which stipulates the purpose and objectives of the ILO and forms an integral part of the ILO's constitution, declares that:

> *(a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.*[525]

Under Article 55.a of its ***Charter***, the United Nations sets as objectives, inter alia, "higher standards of living, full employment, and conditions of economic and social progress and development". Concomitantly, in Article 56, the United Nations member States, "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55" (Art. 56).

The ***International Convention on the Elimination of All Forms of Racial Discrimination*** prohibits all forms of discrimination in the enjoyment of the following rights:

> *Economic, social and cultural rights, in particular: (i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration (Art. 5.e.i).*

The ***Convention on the Elimination of All Forms of Discrimination against Women*** provides for the elimination of "discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights,

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[525] Declaration adopted at the 26th session of ILO General Conference in Philadelphia, 10 May 1944.

in particular: (a) the right to work as an inalienable right of all human beings" (Art. 11.1.a).[526] Moreover, it requires that States parties "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (Art. 2.e).

The ***Convention on the Rights of the Child*** sets as its target the protection of the child "from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development" (Art. 32.1), and requires that States parties "(a) provide for a minimum age or minimum ages for admission to employment; (b) provide for appropriate regulation of the hours and conditions of employment; c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article" (Art. 32.2).

The ***Convention on the Protection of the Rights of All Migrant Workers and Their Families*** prohibits slavery, bondage and forced labor (Art. 11) and all discrimination regarding, inter alia, pay and work conditions (Art. 25); recognizes the right of association (Arts. 26 and 40) and equality of treatment regarding layoffs and unemployment benefits (Art. 54); but allows States parties to restrict – in certain conditions – freedom of choice in employment (Art. 52).

Pursuant to Article 27.1 of the ***Convention on the Rights of Persons with Disabilities***, States parties to the Convention "recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities."

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[526] Articles 10 and 11 of this Convention are devoted entirely to the right to work and its corollaries such as the right to training and to welfare, the prohibition on dismissal in case of pregnancy, etc.

The ***United Nations General Assembly Declaration on Social Progress and Development***[527] states: "Social development requires the assurance to everyone of the right to work and the free choice of employment." (Art. 6.1)

The ***Declaration on the Right to Development***[528] requires that States shall "undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income" (Art. 8.1).

The overall spirit of the articles of the ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas***[529] is that rights holders must be able to live in dignity from the fruits of their production/work and that States must ensure the conditions necessary to achieving this. The right to work is enshrined in Article 13: "Peasants and other people working in rural areas have the right to work, which includes the right to choose freely the way they earn their living" (Art. 13.1). This article prohibits all "forced, bonded or compulsory labour" (Art. 13.6) and provides for the protection of peasant children and other persons working in rural areas from "any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to a child's health or physical, mental, spiritual, moral or social development" (Art. 13.2). It is worth mentioning Article 16 of this Declaration, which enshrines the right to an adequate standard of living encompassing, inter alia: the right to necessary tools and other means of production as well as the right to choose them; the right of access to means of transport and infrastructure enabling

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527 Adopted by the United Nations General Assembly as Resolution 2542 (XXIV), 11 December 1969.

528 Adopted by the United Nations General Assembly as Resolution 41/128, 4 December 1986.

529 Adopted by the United Nations General Assembly, 17 December 2018.

participation in markets (local, national and regional); and the right to establish community systems for the marketing of their products.

In the ***Copenhagen Declaration on Social Development***,[530] States commit themselves "to promoting the goal of full employment as a basic priority of our economic and social policies, and to enabling all men and women to attain secure and sustainable livelihoods through freely chosen productive employment and work" (Commitment 3). Note that the Programme of Action of the World Summit for Social Development devotes its Chapter III to the question of expansion of productive employment and reduction of unemployment. Under this chapter, States commit themselves to improving everyone's access to full and adequately and appropriately remunerated employment as an effective method of combating poverty and promoting social integration. They encourage the prioritization of unemployment and underemployment in national and international policies as well as the regulation and improvement of the remuneration of certain work such as looking after children and home care (§§ 42 to 65).

2. At the Regional Level

Of the 31 articles in the ***European Social Charter***, 29 are devoted to the right to work and the right to social insurance. It is unnecessary to discuss them all here, but we shall mention the Charter's first article, devoted to the right to work.

> *With a view to ensuring the effective exercise of the right to work, the Parties undertake: 1 to accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; 2 to protect effectively the right of the worker to earn his living in an occupation freely entered upon; 3 to establish or maintain free employment services for all workers; 4 to provide or promote appropriate vocational guidance, training and rehabilitation.*

[530] Adopted in March 1995 by the Social Summit.

The ***European Convention on Human Rights*** prohibits slavery and forced labor (Art. 4).

The ***African Charter on Human and Peoples' Rights*** does not explicitly recognize the right to work, but neither does it ignore the rights of the worker: "Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work." (Art. 15)

Further, Article 60 of the Charter requires that States fulfill the rights that they have recognized at the international level. Thus, States parties to the ICESCR commit themselves to realizing the right to work at the national level.

Moreover, almost all the African States have ratified the major international human rights instruments that enshrine the right to work and have even enacted it in national legislation. For example, Article 19 of Burkina Faso's constitution states, "The right to work is recognized and equal for everyone."[531] The first article of Senegal's Labor Code states, "The right to work is recognized for each citizen as a sacred right. The State shall make every effort to help the citizen to find a job and keep it once obtained."[532] It is similar for Gabon, Cameroon and Mali.

It must be emphasized that, by adopting the ***Pretoria Declaration on Economic, Social and Cultural Rights in Africa***,[533] the African Commission on Human and Peoples' Rights declared that:

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531 https://adsdatabase.ohchr.org/IssueLibrary/BURKINA%20FASO_Constitution.pdf

532 https://www.ilo.org/dyn/travail/docs/839/Code%20du%20travail.pdf

533 Provision 6 of the Annex to Resolution 78. ACHPR /Res.73(XXXVI)04, adopted 7 December 2004 at the 36th session of the African Commission on Human and Peoples' Rights, https://archives.au.int/bitstream/handle/123456789/5414/Declaration%20on%20Economic%2C%20Social%20and%20Cultural%20Rights_ENG.pdf?sequence=1&isAllowed=y

The right to work in Article 15 of the Charter entails among other things the following:
- Equality of opportunity of access to gainful work, including access for refugees, disabled and other disadvantaged persons;
- Conducive investment environment for the private sector to participate in creating gainful work;
- Effective and enhanced protections for women in the workplace including parental leave;
- Fair remuneration, a minimum living wage for labor, and equal remuneration for work of equal value;
- Equitable and satisfactory conditions of work, including effective and accessible remedies for workplace-related injuries, hazards and accidents; (...)
- The right to freedom of association, including the rights to collective bargaining, strike and other related trade union rights;
- Prohibition against forced labor and economic exploitation of children, and other vulnerable persons;
- The right to rest and leisure, including reasonable limitation of working hours, periodic holidays with pay and remuneration for public holidays.

States parties to the ***Protocol of San Salvador*** to the American Convention on Human Rights recognize the right to work (Art. 6), the right to just, equitable and satisfactory conditions of work (Art. 7), the right to unionize (Art. 8) and the right to social security (Art. 9).

Article 6 dealing with the right to work is explicit:

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
2. The States Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of

technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

This protocol also provides for the right of elderly people to "undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires" (Art. 17.b), and for disabled people "work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be" (Art. 18.a).

C. Specific Obligations of States Regarding the Right to Work and Its Corollaries

The right to work is not an aspiration or philosophical affirmation but a legal obligation for States. Like other human rights, the right to work requires that States respect, protect and implement it. Among States' specific obligations regarding the right to work, the CESCR lists the following:

- recognize the right to work in national legal systems and adopt a national policy on the right to work as well as a detailed plan to implement it;
- progressively ensure the full exercise of the right to work;
- guarantee that the right to work will be exercised "without discrimination" (Art. 2.2 of the ICESCR);
- ensure the right of women and youth to decent work, hence take measures to fight against discrimination and promote equality of access and opportunity;
- ensure equality of access to work and training;
- make sure that privatization measures do not weaken workers' rights;

- measures taken to increase labor market flexibility must not lead to a reduction in job security or workers' social protection;
- in principle, no retrograde measure should be adopted regarding the right to work;
- prohibit forced or compulsory labor and refrain from denying or impairing equal access to decent work for all, especially disadvantaged and marginalized individuals and groups such as prisoners, members of minorities and migrant workers;
- prohibit child labor for those under 16;
- prohibit all forms of economic exploitation and forced labor of children;
- prohibit forced or compulsory labor among non-State actors.[534]

Similarly, "States parties should establish a functioning system of labour inspectorates, with the involvement of social partners, to monitor all aspects of the right to just and favourable conditions of work for all workers, including workers in the informal economy, domestic workers and agricultural workers"[535].

States' Non-Compliance with Their Obligations

The CESCR makes a distinction between inability and unwillingness of States in implementing the right to work. It also defines non-compliance in terms of "acts of omission" and "acts of commission":

"Violations through *acts of omission* occur, for example, when States parties do not regulate the activities of individuals or groups to prevent them from impeding the right of others to work. Violations through *acts of commission* include forced labour; the formal repeal or suspension of legislation necessary for continued enjoyment of the right to work; denial of access to work to particular individuals or groups, whether such discrimination is based on

[534] CESCR, General Comment No. 18, E/C.12/GC/18, §§ 19 to 28.
[535] CESCR, General Comment No. 23, E/C.12/GC/23, § 54.

legislation or practice; and the adoption of legislation or policies which are manifestly incompatible with international obligations in relation to the right to work."[536]

States' failures to respect, protect and fulfill the right to work include the following situations:

- The State violates its obligation to ***respect*** the right to work when laws, policies and actions are contrary to the norms set forth in Article 6 of the Covenant. Not taking into account the legal obligations incumbent upon it by virtue of the right to work when negotiating bilateral or multilateral agreements with other States, with international organizations or with entities such as transnational corporations also constitutes a violation of its obligation to respect the right to work.
- The State violates its obligation to ***protect*** when it refrains from taking all the measures incumbent upon it to protect the persons under its jurisdiction from infringements by third parties of the right to work.
- Violations of the obligation to ***fulfill*** include failing to adopt or to implement a national labor policy intended to guarantee to everyone the realization of this right; budgeting insufficient funds for employment or misallocating public resources so that it will be impossible for certain individuals or groups to exercise their right to work; failing to set up technical and professional training programs.[537]

Concerning fair and equitable working conditions (Art. 7 of the ICESCR), a State can default on its obligations "by failing to enforce relevant laws and implement adequate policies, or to regulate the activities of individuals and groups to prevent them from violating the right, or to take into account its Covenant obligations when

536 CESCR, General Comment No. 18, E/C.12/GC/18, §32.
537 Idem, §§ 33 to 36.

entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations".[538]

D. Examples of Implementation

1. At the National Level

In numerous countries there are labor tribunals handling litigation arising from the right to work. Thus, it is, of course, possible to apply to the courts to demand respect for the right to work, based on national legislation, but also on the ILO's international labor law conventions and human rights conventions. It is also possible, depending on the case, to apply to ordinary courts (e.g. an administrative tribunal), citing in particular the international human rights instruments, in order to obtain respect for the right to work and its corollaries.

In its ruling of 23 May 2019, the New York State Supreme Court (***United States***) concluded that the State Employment Relations Act (SERA) violated Article I.17 of the State's constitution (right to unionize and to collective bargaining), given that it excluded agricultural workers from its scope. This ruling has allowed the creation of agricultural workers' unions and associations and guaranteed the right to unionize and bargain collectively to more than 80,000 workers.[539]

Regarding the laying off of five unionized workers at Maseno University owing to their participation in a strike, the Industrial Court of ***Kenya*** on 18 September 2013, concluded that the termination of the plaintiffs' employment contracts was illegal and unjustified, violating ILO Convention No. 158 and the recommendations of the ILO Committee on Freedom of Association.

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538 CESCR, General Comment No. 23, E/C.12/GC/23, § 79.

539 Hernandez v. State, 99 N.Y.S.3d 795 (App. Div. 2019), https://www.escr-net.org/caselaw/2022/hernandez-v-State-99-nys3d-795-app-div-2019

It also emphasized the importance of preventing acts of anti-union discrimination, in particular for union leaders and delegates in order that they may freely and independently fulfill their role, without suffering prejudice.[540]

The trade union UNISON, supported by the Equality and Human Rights Commission and the Independent Workers Union of Great Britain, challenged before the Supreme Court of the ***United Kingdom*** the legality of the 2013 Fees Order which established procedural costs at the labor courts and appellate court. In its 26 July 2017 ruling, the Supreme Court found in favor of the plaintiffs, considering that the foundational text was illegal with regard to domestic and European law, for it resulted in an obstacle to access to justice.[541]

2. At the Regional Level

The ***African Commission on Human and Peoples' Rights*** is entrusted with oversight, respect and implementation of the regional human rights instruments throughout Africa, including the Charter, which recognizes the right to work in Article 15. In its ruling of 22 May 2008, the Commission held that there had been a violation of the right to work (Art. 15 of the African Charter on Human and Peoples' Rights), along with the violation of other articles of the Charter, in the 2004 arrest and expulsion of 14 Gambians working in

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[540] Industrial Court of Kenya, Universities Academic Staff Union v. Maseno University, Case No. 814'N' of 2009, 18 September 2013: https://compendium.itcilo.org/en/compendium-decisions/industrial-court-of-kenya-universities-academic-staff-union-v-maseno-university-18-september-2013-case-no-814n-of-2009?set_language=en

[541] Trinity Term [2017] UKSC 51 On appeal from: [2015] EWCA Civ 935, (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent), [2017] UKSC 51: https://www.escr-net.org/caselaw/2017/r-application-unison-appellant-v-lord-chancellor-respondent-2017-uksc-51

mines in ***Angola,*** despite the fact that they were legally established in the country.[542]

On 30 November 2022, the ***European Committee of Social Rights*** declared that, in the case of the *CFDT de la métallurgie de la Meuse*, ***France*** had violated Article 24.b of the Charter by not guaranteeing adequate compensation to workers laid off for no valid reason, under the conditions set by Article L.1235-3 of its labor code.[543]

In a ruling on 7 October 2021, the ***European Court of Human Rights*** noted, in the case of *Zoletic and others v. Azerbaijan*, a violation by ***Azerbaijan*** of Article 4 §2 of the European Convention on Human Rights. The thirty plaintiffs recruited in Bosnia-Herzegovina as temporary construction workers for building sites in Baku were victims of forced labor (restriction of their freedom of movement, withholding of their wages, poor living conditions...).[544]

On 2 February 2001, the ***Inter-American Court of Human Rights*** found ***Panama*** had violated the right to organize trade unions, the right to protection and the right to guaranteed judicial redress of 270 workers. The Court required Panama to rehire these workers in their initial jobs and to pay them back the wages owed.[545] This was the first case in which the Inter-American Court of Human Rights dealt with the right to work.

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542 Communication 292/2004, Institute for Human Rights and Development in Africa/Republic of Angola https://caselaw.ihrda.org/en/entity/dggr8q8jxbj7injtulgd86w29

543 https://hudoc.esc.coe.int/eng#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22:[%22cc-175-2019-dmerits-en%22]}

544 https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-212040%22]}

545 Case of *Baena-Ricardo et al. v. Panama* https://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf

3. At the International Level

The ILO Committee on Freedom of Association[546]

In 2002, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) filed a compliant with the ILO arguing that, following the decision of the ***United States*** Supreme Court (Hoffman case), José Castro (an undocumented worker) "was not entitled to back pay for lost wages after he was illegally dismissed for exercising [trade union] rights protected by the National Labor Relations Act (NLRA). By this decision, the complainants contend that millions of workers in the United States lost their only protection of the right to freedom of association, the right to organize, and the right to bargain collectively."[547] Finding in favor of the plaintiffs, the Committee on Freedom of Association concluded by requesting that the United States government *explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision*.[548]

Notwithstanding the claims of the United States government to apply the Hoffman decision restrictively, the ILO Committee examined the matter for the last time (2011) and concluded that: *the remedies available in cases of anti-union dismissals of undocumented workers still do not enable the sanctioning of such acts, nor the possibility*

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546 Further information can be found on the ILO website, https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/committee-freedom-association-cfa

547 Report No. 332, November 2003, Case No. 2227, §555, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2907332

548 Ibid, § 613.

of adequate compensation taking into account both the damage incurred and the need to prevent the repetition of such situations in the future. The Committee expects that the Government will take all necessary steps so that undocumented workers are sufficiently protected against acts of anti-union discrimination.[549]

In their 22 December 2022 complaint, three Dutch unions (Federation of Professional Unions, the Netherlands Association of Airline Pilots (VNV) and the Netherlands Association of Aviation Technicians) reproached the government of the ***Netherlands*** for having forcibly modified, during the COVID-19 pandemic, the collective convention between them and an airline in such a way as to affect long-term employment conditions. In its March 2022 decision, the Committee on Freedom of Association recalled that *"measures that might be taken to confront exceptional circumstances ought to be temporary in nature having regard to the severe negative consequences on workers terms and conditions of employment and their particular impact on vulnerable workers."* In the Committee's view, *"The duration and the impact of the above-mentioned measures are strictly limited to the exceptional circumstances faced"*.[550]

In 2007, the ***Committee on the Application of Standards*** pointed out in its conclusions concerning ***Italy*** that "measures to increase labour market flexibility needed to ensure appropriate protection for workers against dismissal and in obtaining a permanent employment contract which was productive and freely chosen." Further, the Committee encouraged the Italian government to "continue to mainstream its national programmes for full and

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549 Report No. 362, November 2011, §52, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID,P50002_LANG_CODE:2907354,en

550 Case No. 3398 (Netherlands), §§ 646, 647, https://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:4141457

productive employment, the promotion of decent work and high-quality work for all, as required by the Convention".[551]

Within the framework of the ***ILO Representation Procedure against a Member State***, Yapi-Yol Sen, a trade union organization of Turkish civil servants, appealed in 2006 to the ILO Governing Body under Article 24 of the ILO Constitution alleging non-compliance by the government of ***Turkey*** with Convention No. 87 (1948) on trade union freedom and the protection of the right to organize. The plaintiff accused the Turkish government of having unilaterally modified the system of branches of activity in which civil servant unions could be set up. Thus, Yapi-Yol Sen automatically lost members and found itself in financial difficulty. Following an examination of the case, the Committee on Freedom of Association observed that this was the second such case concerning Turkey in which the Minister of Labor and Social Security modified the classification of branches of activity on the basis of dubious criteria. Finding in favor of the plaintiff, the Committee in its conclusions requested that the Turkish government take all necessary measures as soon as possible to revise its legislation in conformity with Convention No. 87, which Turkey had ratified.[552]

Under the ***ILO Interstate Complaint Procedure***, Article 33 was used for the first time in the history of the ILO in 2000, when the Governing Body asked the International Labour Conference to take measures to lead ***Myanmar*** to end the use of forced labor. An article 26 complaint had been filed against Myanmar in 1996 for violations of the Forced Labour Convention, 1930 (No. 29), and the resulting

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551 ILO Conference, 96th session, Geneva, 2007, Extracts from the record of proceedings of the Committee on the Application of Standards, Part II, p. 85: https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_088133.pdf

552 Complaint against the Government of Turkey presented by Yapi-Yol Sen Report No. 347, Case No. 2537, https://normlex.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO::P50012_LANG_CODE:en:NO

Commission of Inquiry had found 'widespread and systematic use' of forced labour in the country".[553]

In its Concluding Observations on the sixth periodic report of the ***United Kingdom***, the ***CESCR*** noted, inter alia, "the high incidence of part-time work, precarious self-employment, temporary employment and the use of 'zero hour contracts' in the State party, which particularly affect women". It pointed out that the national minimum wage was insufficient to guarantee a decent standard of living in the country and noted with concern "the recent adoption of the Trade Union Act 2016, which has introduced procedural requirements that limit the right of workers to undertake industrial action". The Committee was also concerned about the shortcomings in the implementation of the Employment Relations Act 1999 and its Regulation 2010, prohibiting blacklisting of trade union members (Art. 8). The Committee recommended that the United Kingdom "take all appropriate measures to progressively reduce the use of temporary employment, precarious self-employment and 'zero hour contracts', including by generating decent work opportunities that offer job security and adequate protection of labour rights". It requested that the government ensure that the right to work and the right to social security of the persons concerned "are fully guaranteed in law and in practice", and that the national minimum wage be regularly reviewed and set at a level sufficient to allow a decent standard of living. Moreover, the Committee further recommended "a thorough review of the new Trade Union Act 2016" and the respect of trade union rights by the government.[554]

In an opinion adopted on 4 December 2015, the ***Committee on the Elimination of Racial Discrimination*** took ***Slovakia*** to task for discrimination based on ethnic origin in access to employment

[553] https://www.ilo.org/international-labour-standards/ilo-supervisory-system-regular-supervision/applying-and-promoting-international-labour-standards/complaint-procedure-art26

[554] E/C.12/GBR/CO/6, 14 July, §§ 31, 32; 36 to 39.

concerning a young Roma teacher.[555] Noting that the plaintiff's application had not been accepted for administrative reasons and taking into account the derogatory remarks by the school principal regarding the author's Roma origin, the Committee concluded that there had been a violation of the right to work, under Article 5(e)(i) of the Convention.[556]. The Committee also requested that Slovakia "convey an apology to the petitioner and grant her adequate compensation for the damage caused".[557]

In a decision of 4 April 2014 concerning the Gröninger family, the ***Committee on the Rights of Persons with Disabilities*** reminded ***Germany*** that Article 27 of the Convention involves "an obligation on the part of States parties to create an enabling and conducive environment for employment, including in the private sector."[558] In this case, the German system is deficient in that the proposed aids are intended only for the "temporarily" and not the "permanently" disabled. The program to integrate these persons into society had had a dissuasive effect for employers and had caused indirect discrimination in hiring owing to the administrative complications that it gave rise to. The Committee concluded that there had been a violation of the right to work and requested a reexamination of the plaintiff's case as well as compensation. It also called for a review of the functioning of the program of aid to the disabled.

Impact of Globalization and the Uberization of Work on the Right to Work and Its Corollaries

The neoliberal economic policies implemented on a worldwide scale for some four decades have profoundly changed the economic environment and workplace relations with, in

555 CERD/C/88/D/56/2014, 6 January 2016.
556 Ibid., § 7.3.
557 Ibid., § 9.
558 CRPD/C/D/2/2010, 7 July 2014, § 6.2.

particular, a substantial reinforcement of the overweening power of transnational corporations and the domination of the finance sector over the real economy. Among the main consequences of this neoliberal globalization, workers are pitted against each other, and the sovereignty of States is weakened, diminishing peoples' and citizens' control over their future.

Thus, off-shoring, anti-union practices, job insecurity and unemployment have all become almost ordinary and "acceptable", as has the rollback, or indeed the dismantling, of labor law. In parallel, the tax breaks accorded to the transnational corporations, their practices of financial criminality as well as "stock market crises" contribute further to the degradation of the world of work and the increase of unemployment.

In this context, it is hardly surprising to note the deterioration in working conditions, the increase in violations of the right to work and of labor law, as well as widespread human rights violations. It would be repetitive to describe all the consequences of this phenomenon for the world of work. We might, however, mention some of the aspects that most affect the right to work and its corollaries: attacks on union rights and increasing repression of union leaders and members; widespread layoffs (owing to privatization of public sectors, monopolistic concentration, off-shoring, etc.); increase in the length of the working hours and the pace of work; precariousness of employment; excessive flexibilization of employment contracts (on-call work, "home office" work, teleworking, etc.); child labor; forced labor; proliferation of duty-free zones; deterioration of workers' health; health and safety negligence resulting in the death of thousands of workers; financial crime; brain drain and immigration – and the list goes on…

In recent years, these practices have been compounded by the uberization of employment (the business model of digital work

platforms), which poses a number of problems, such as obstacles to the organization of workers to defend their rights; refusal by employers to provide social insurance benefits; permanent surveillance of workers online; systematic evaluation of workers by customers and clients; low wages (e.g. the minimum wage in the United States for online work is US$ 3.40 per hour, but half of those working in this sector earn less than US$ 2.10 per hour).[559]

While more and more voices are calling into question neoliberal globalization, one cannot but note that, for the time being at least, there is no noticeable change in economic policies at the global level and that the widespread human rights violations continue. In parallel, in today's society, one wonders about the very meaning of work, which is entirely geared to the individual, and to the cult of performance, of wealth, of mindless consumerism. It is certainly no accident that the system is confronted with a phenomenon that is spreading across the world, called *quiet quitting*, owing to the degradation of the conditions of work.[560]

The Uber Case

The Uber business model no doubt constitutes the epitome of deregulation, i.e. the art of circumventing labor standards built on the sacrifices and struggles – often harshly repressed by the powers that be – of generations over more than a century. Under this modus operandi, the employer is freed of all responsibilities by making the employees (considered "self-employed" or "independent") assume all expenses and risks (social insurance, wear and tear on the vehicle, etc.), by paying them per task ("piecework") and retaining a substantial share of the profits

559 *The role of digital labour platforms in transforming the world of work*, ILO, Geneva, 2021. Available at: https://www.ilo.org/publications/flagship-reports/role-digital-labour-platforms-transforming-world-work

560 https://www.edflex.com/blog/origines-et-gestion-de-crise-quiet-quitting-que-risquent-les-entreprises [French only]

generated by each task. Worse, Uber and its like also use subcontractors in recruiting their employees in order to provide legal protection for themselves. This business model has become a text-book case and has been taken up by Uber's competitors. For this reason, it is appropriate to give a brief overview of this company and some of the successful legal actions taken against it.

Created in 2009 in San Francisco (United States), Uber is the first worldwide digital work platform, originally for the transport of persons. It has had a meteoric rise, now has a foothold in some 10,000 cities in more than 70 countries,[561] and has extended its services to meal delivery. The enterprise is known above all for refusing to shoulder social insurance and other costs (employees' vehicle maintenance, for example), for it claims that its role is merely to "connect" – through an online application – the persons wishing to use a service and those supplying the service, i.e., its employees, whom it takes on as "independent contractors". Nonetheless, this company obviously has substantial means and makes substantial profits, for it was valued, s early as 2015, at US$ 50 billion.[562]

In recent years, Uber has lost several cases in the high courts of various European countries such as Spain, France,[563] the Netherlands, the United Kingdom[564] and Switzerland.[565]

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561 https://www.uber.com/ch/en/about/uber-offerings/?utm_campaign=CM2044779-search-google-brand_61_-99_FR-National_rider_web_acq_cpc_fr-FR_Brand_Exact_uber_kwd-169801042_524344104671_121667789966_e_c&utm_source=AdWords_Brand

562 See also https://en.wikipedia.org/wiki/Uber

563 See the ruling of March 2020 of the Cour de cassation civile, Chambre sociale, 19-13.316, https://www.legifrance.gouv.fr/juri/id/JURITEXT000042025162?isSuggest=true

564 See *Uber BV and others (Appellants) v Aslam and others (Respondents)*, https://www.bailii.org/uk/cases/UKSC/2021/5.html

565 See the ruling of the Swiss Federal Tribunal of 30 May 2022 concerning the appeal of Uber Switzerland GmbH and Uber B.V. against the Service de police du

Business Tribunal No. 3 of Barcelona (Spain) referred a case to the ***European Union Court of Justice*** which confirmed the existence of a relationship of subordination between Uber and its "service providers", i.e. an employer-employee relationship:

the intermediation service provided by Uber is based on the selection of non-professional drivers using their own vehicle, to whom the company provides an application without which (i) those drivers would not be led to provide transport services and (ii) persons who wish to make an urban journey would not use the services provided by those drivers. In addition, Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.[566]

The European Commission, for its part, presented a draft directive 2021/0414 (COD) on November 9, 2021, proposing a presumption of employment status for digital platform workers. It is currently under discussion at the European Council.[567]

In the ***United States*** (where the company is headquartered), a California court on 11 August 2020 ordered Uber to designate its

commerce et de lutte contre le travail au noir du Canton de Genève, https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://30-05-2022-2C_34-2021&lang=fr&zoom=&type=show_document; see also the rulings of 16 February 2023, https://www.bger.ch/files/live/sites/bger/files/pdf/fr/9c_0070_2022_2023_03_22_T_f_14_12_27.pdf

[566] Asociación Profesional Elite Taxi vs. Uber Systems Spain SL (case C-434/15), § 39, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0434

[567] https://eur-lex.europa.eu/procedure/EN/2021_414

independent drivers as employees.[568] This order was based on the "AB5" law, which entered into force on 1 January 2020 and required digital platforms, also called *gig economy* companies, to consider their independent workers as employees. This law was contested in a referendum, *Proposition 22*, supported by digital platforms such as Uber and Lyft (spending some US$ 200 million), which garnered 58% of the votes (November 2020). A further reversal of the situation occurred on 20 August 2021 with the Alameda County Superior Court, which considered the proposition unconstitutional and inapplicable.[569]

The company's strategy is clear: draw out the case against it by using procedural tactics to gain time, for judicial procedures can take years,[570] hive off its responsibility as an employer onto recruitment subcontractors[571] and carry on with business as usual. As well, the Uber Files[572] have revealed its intense lobbying of governments with a view to reaching a "secret agreement"[573] to

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568 https://www.letemps.ch/economie/statut-salarie-chauffeurs-uber-perdent-une-bataille-californie

569 https://www.latimes.com/business/story/2022-12-13/california-prop-22-appeals-court-hearing-weighs-gig-workers-fate

570 The litigation in Switzerland lasted five years, and the ruling of the Swiss Federal Tribunal has still not been enforced. In France, the lawsuit against Uber involves individuals and does not make it possible to prevent the company from operating, given that France, unlike Spain, has not passed adequate legislation.

571 For example, Uber Switzerland uses MITC for drivers and Chaskis for deliverers. See *Le sous-traitant d'Uber Eats dans le collimateur de l'Etat*, L'Événement syndical, 14 December 2022, https://www.evenement.ch/articles/le-sous-traitant-duber-eats-dans-le-collimateur-de-letat

572 See the revelations by Mark MacGann, former Uber lobbyist for Europe, the Middle East and Africa, 2014 to 2016, in The Uber Files, https://www.icij.org/investigations/uber-files/uber-lobbyist-whistleblower-mark-macgann/

573 See inter alia, *Ouest-France*, 10 July 2022, https://www.ouest-france.fr/politique/emmanuel-macron/uber-files-une-enquete-revele-le-deal-secret-entre-macron-et-l-entreprise-la-gauche-indignee-d7b80028-5b5f-4486-82dc-634f30469563

prevent regulation of digital platforms and thwart the implementation of existing work standards. The company is said to have spent up to US$ 90 million per year on lobbying.[574]

While Uber and its like (Deliveroo, Smood, etc.) have enjoyed some success in this area, their days appear to be numbered. Deliveroo's managers have been found guilty in criminal proceedings in France and the company decided to abandon the Spanish market following the passage of the Rider Law (2021) requiring digital platforms to consider its workers as employees. These legal proceedings can have a salutary effect on the entire sector. This tendency ought to push other States to counter the uberization of their economies and genuinely protect workers' rights.

[574] *Le Matin*, 8 January 2023, https://www.lematin.ch/story/les-dessous-de-luberisation-du-monde-et-de-la-suisse-506044443778

CHAPTER 6

THE RIGHT TO SOCIAL SECURITY

Social security (also called social protection) is a system of social benefits intended to protect against risks and unforeseen contingencies. A product of the industrial era and linked to employment, it aimed to respond to emergencies such as illness and work-related accidents, as well as institutionalizing solidarity within society so that individuals need not depend on charity. Social security has spread progressively into other areas and now covers a wide spectrum of risks and contingencies (unemployment, maternity/paternity, old age, disability, income loss, aid to families and children, and benefits for survivors and orphans).

The advent of the "welfare state" was naturally a choice of society. With the creation of the International Labour Organization (ILO) then the United Nations, social security became a basic human right and was codified as such in international treaties. However, although efforts have been made by some States, 70% of the world's population is entirely or partially excluded from the social security system. Worse, the implementation of neoliberal policies at the global level over the past four decades is taking us in the direction of a dismantling or, at least, a weakening of social security in the countries where it was successfully institutionalized and universalized after the Second World War (especially in Europe).

As is generally acknowledged, neoliberal ideology is opposed to all forms of State intervention except for the implementation of mechanisms of repression and the promotion of the "free market", while relying on the individual's ability to fend for himself. Moreover, this corresponds to the imperative of the uberization of the economy and the concomitant rollback of labor legislation, such

as the legalization of on-call work, "self-employed" status for workers, teleworking, working from home, etc. (see also the chapter on the right to work).

In a world where almost half of humanity is forced to live in poverty or even in destitution, social security indubitably allows an improvement of living conditions. As the United Nations Special Rapporteur on Human Rights and Extreme Poverty has declared:[575] "Ensuring access to social protection is thus not a policy option, but a State obligation under international human rights law."[576]

While social security per se cannot entirely replace economic, social and cultural rights (work, adequate housing, education, etc.) it can constitute a major aid to the realization of these rights. Depending on the context and the country, it may be the only way to grant a modicum of dignity to hundreds of millions of persons.

A. Definition and Content of the Right to Social Security

International norms in the area of human rights and the right to work in particular recognize social security as a basic right. Those norms developed within the ILO and the United Nations are authoritative. In this chapter we will mention a number of them, which clarify the contours of the right to social security.

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[575] The authors of the reports mentioned in this chapter are (in chronological order): Maria Magdalena Sepúlveda Carmon (2008-2014), Philip Alston (2014-2020), Olivier De Schutter (since March 2020).

[576] Report on Human Rights and Extreme Poverty, A/65/259, 9 August 2010, § 10.

1. Definition according to the International Organizations

a) ILO

Social security is one of the mainsprings of the ILO,[577] for over time it has become one of the main objectives of that organization. The ***Declaration Concerning the Aims and Purposes of the ILO*** (Declaration of Philadelphia, 1944) advocated "the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care".[578]

At the same time, the ILO adopted two recommendations aiming to make "social insurance" compulsory and achieve universal medical insurance coverage. Considering that the means of subsistence are an essential element of social security, the ***ILO Income Security Recommendation No. 67***, 1944,[579] established guiding principles recommending compulsory social insurance covering the following areas: a) sickness; b) maternity; c) disability; d) old age; e) death of the family provider; f) unemployment; g) unexpected exceptional expenses; h) injuries or sickness resulting from work (Art. 7). The ***ILO's Medical Care Recommendation No. 69***,[580] declared that "the medical care service should cover all members of the community, whether or not they are gainfully occupied." (Art. 8)

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577 Several ILO conventions deal with questions of social security such as minimum wage, equal pay for equal work, maternity, insurance in various economic sectors (especially industry and agriculture), worker safety and health etc.: http://www.ilo.org/dyn/normlex/fr/f?p=1000:12000:0::NO; see also Chapter III.A.

578 Adopted in Philadelphia, 10 May 1944, at the 26th session of the International Labour Conference: https://www.ilo.org/static/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf

579 Adopted in Philadelphia, 12 May 1944, at the 26th session of the International Labour Conference.

580 Ibid.

In 1952, the ILO adopted ***Convention No. 102 concerning minimum standards of social security***[581] which cover the following areas: illness; old age; unemployment; workplace accidents and occupational illnesses; invalidity; maternity; and benefits for families and survivors.

In its ***Declaration on Social Justice for a Fair Globalization***,[582] the ILO advocated the extension of social security to include a basic income for all, *"to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes."* (§ I.A.ii)

In June 2012, the ILO adopted the ***Social Protection Floors Recommendation No. 202*** in line with preceding ILO commitments in this area and constituting a sort of road map for States.[583]

b) The United Nations

All the international human rights treaties enshrine social security or at least some of its aspects. Among these are, in particular, the Universal Declaration of Human Rights (1948) and the ICESCR (1966).

The great strength of the ***Universal Declaration of Human Rights*** is that it considers the basic needs of all human beings in their entirety, including social security:

> *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and* ***the right***

[581] Adopted 28 June 1952; entered into force 27 April 1955; ratified so far by 64 States: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247.

[582] Adopted in Geneva, 10 June 2008 at the 97th session of the International Labour Conference.

[583] Adopted in Geneva, 14 June 2012 at the 101st session of the International Labour Conference: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3065524:NO.

> ***to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*** *(Art. 25.1; emphasis added)*

Article 22 also concerns the right to social security:

> *Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*

States parties to the ***ICESCR*** "recognize the right of everyone to social security, including social insurance" (Art. 9). Besides the other economic, social and cultural rights enshrined in the ICESCR such as food, health, education and adequate housing, they recognize that:

> *the widest possible protection and assistance should be accorded to the family, […] to mothers during a reasonable period before and after childbirth. […] Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. (Art. 10)*

For the ***United Nations CESCR*** the right to social security encompasses:

> *the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.*[584]

[584] CESCR, General Comment No. 19, § 2.

The ***United Nations Special Rapporteur on Extreme Poverty and Human Rights*** interprets social protection to mean "policies and programmes aimed at enabling people to respond to various circumstances and manage levels of risk or deprivation deemed unacceptable by society. The objectives of these schemes are to offset deprivation and ensure protection from, inter alia, the absence or substantial reduction of income from work; insufficient support for families with children or adult dependents; lack of access to health care; general poverty; and social exclusion."[585]

2. Constitutive Elements of the Right to Social Security

The ***CESCR*** has identified five constitutive elements of the right to social security, which it considers "essential... in all circumstances".[586] These are: the availability of a social security system; the coverage of social risks and contingencies; adequacy of the social security system; accessibility of the social security system; linkages between the right to social security and other human rights. The Committee reckons that, in the interpretation of these elements, "it should be borne in mind ***that social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy***".[587]

a) Availability of a Social Security System

It is obvious that the implementation of the right to social security depends on the existence of a properly functioning social security system. In any given country there can be one or several social security schemes to deal with social risks and contingencies. In this regard, the CESCR recalls States' obligation to "take responsibility for the effective administration or supervision of the system." For the Committee, "the schemes should also be sustainable, including those

585 A/65/259, § 8.
586 CESCR, General Comment No. 19, § 10.
587 Ibid., emphasis added.

concerning provision of pensions, in order to ensure that the right can be realized for present and future generations."[588]

b) Coverage of social risks and contingencies

A social security system should cover the following nine major areas: medical care; care in the event of sickness; maternity/paternity leave; disability; old age; unemployment; workplace accidents; survivor and orphan benefits; aid to families and to children.

c) Adequacy of the Social Security System

The CESCR understands adequacy of the social security system to mean, in particular, the following: "benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care. […] States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided."[589]

d) Accessibility of the Social Security System

Accessibility of the social security system must correspond to the following criteria: i. coverage; ii. admissibility; iii. economic accessibility; iv. physical access; v. participation and information.

i. Coverage

As a human right, social security must be universal, including and especially for persons unable to contribute to it, and the Committee emphasizes that "all persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination. […] In order to

[588] Ibid., § 11.
[589] Ibid., § 22.

ensure universal coverage, non-contributory schemes will be necessary".[590]

ii. Admissibility

Everyone should be unconditionally admitted to the social security system, given that it is a basic human right. On the other hand, as the Committee stipulates, "the withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law".[591]

For the ILO, in the context of a work relationship, exceptions to measures of this sort may apply only in certain circumstances.[592]

In a recent report, the Special Rapporteur was concerned by the lack of recourse to social benefits, pointing out that those entitled to these benefits do not avail themselves of them for multiple reasons, for example: "when individuals do not claim the benefits to which they are entitled, owing to a lack of information, bureaucratic hurdles or the fear of humiliation, it is not a cost that society avoids but a missed opportunity to reduce poverty and inequalities, and thus to improve social cohesion and long-term development prospects."[593] In the report, there is a series of recommendations to remedy this.

iii. Economic Accessibility

Whatever the social security scheme adopted (public, private or mixed), the individual's contribution must not be prohibitive. The CESCR reckons that "the direct and indirect costs and charges

590 Ibid., § 23.
591 Ibid., § 24.
592 ILO Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), Art. 20.
593 Special Rapporteur on Human Rights and Extreme Poverty, Non-take-up of rights in the context of social protection, A/HRC/50/38, 19 April 2022, § 1.

associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights [such as food, adequate housing, education, etc]".[594]

iv. Physical Access

By physical access, the CESCR means that "benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant. Particular attention should be paid in this regard to persons with disabilities, migrants, and persons living in remote or disaster-prone areas, as well as areas experiencing armed conflict, so that they, too, can have access to these services."[595]

v. Participation and Information

If one considers social security a human right and a social asset in a democratic and participatory society, it is obvious that the beneficiaries of social security systems should receive the necessary information regarding their rights and participate in the administration of the social security system, as recommended by the CESCR [596] and required by the ILO.[597]

e) Links with Other Rights

Social security is intended to protect against social risks and contingencies in order to preserve human dignity. In this regard, one can consider the right to social security an aid to the fulfillment of other human rights. Further, it is indispensable to the survival of every category of persons (children, the aged, the disabled, the unemployed, etc.). This is why the Committee emphasizes that "the

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[594] CESCR, General Comment No. 19, § 25.

[595] Ibid., § 27.

[596] Ibid., § 26.

[597] ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), Article 72.1.

adoption of measures to realize other rights in the Covenant [food, adequate housing, education, etc.] will not in itself act as a substitute for the creation of social security schemes."[598] It also considers it necessary to envision special measures for the protection of marginalized and disadvantaged groups and persons by creating, for example, "crop or natural disaster insurance for small farmers or livelihood protection for self-employed persons in the informal economy."[599]

Although the five constitutive elements of the right to social security are clear, in practice, many persons find themselves excluded from the social security system owing to their status, to the insufficiency of their income (for example the unemployed, workers with no job security, people with disabilities, migrants, asylum seekers, etc.) and to the insufficiency of measures taken by States (or of States' means; or because of restrictions imposed on their sovereignty by the IMF, the World Bank and the WTO, for example). (See also Part I, Chapter 2.D on the obstacles to implementation of economic, social and cultural rights).

B. Pertinent Norms

1. At the International Level

Building on the Universal Declaration of Human Rights, numerous international human rights conventions have included social security in their corpus and thus contain at least one article devoted to it.

The ***International Convention on the Elimination of All Forms of Racial Discrimination*** prohibits all discrimination in the areas of, inter alia, "economic, social and cultural rights, in particular: […] the

[598] CESCR, General Comment No. 19, § 28.
[599] Ibid.

right to public health, medical care, social security and social services" (Art. 5.e.iv).

The States parties to the ***Convention on the Elimination of All Forms of Discrimination against Women*** "take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: […] the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave" (Art. 11.1.e). This convention provides further for ***rural women*** to be able to "to benefit directly from social security programmes" (Art. 14.2.c).

Under the ***Convention on the Rights of the Child***, States parties "recognize for every child the right to benefit from social security, including social insurance" (Art. 26).

Article 28 of the ***Convention on the Rights of Persons with Disabilities*** is intended to be comprehensive, given that it is devoted to an adequate standard of living and social protection in all its components.

Regarding social security, the ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*** states that "with respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties." (Art. 27). Note that this Convention applies to all migrant workers, whatever their status, and to members of their families.[600]

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[600] For further information, see inter alia, Melik Özden, *For The Respect of The Rights of All Migrant Workers* (Geneva: CETIM, 2011): https://www.cetim.ch/for-the-respect-of-the-rights-of-all-migrant-workers/.

ILO Convention No. 97 on migrant workers (revised)[601] enshrines equality of treatment between migrants with regular status and nationals without discrimination on grounds of nationality, race, religion or sex, in respect of remuneration, housing, social security, union rights, taxes and access to justice (Art. 6).

ILO Convention No. 189 on domestic workers[602] provides that "domestic workers enjoy minimum wage coverage", from social security, including maternity leave, and that they be paid "at least once a month". (Arts 11, 14.1, 12.1 respectively).

Article 22 of the ***Declaration on the Rights of Peasants and Other People Working in Rural Areas*** enshrines "the right to social security, including social insurance" for peasants and rural workers, as well as rural migrants. Under this article, States "should establish or maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security."

With the ***Declaration on Social Progress and Development***,[603] States committed themselves to, inter alia, assuring the "provision of comprehensive social security schemes and social welfare services […]" (Art. 11).

The ***World Summit for Social Development*** tackled the subject of enhanced social protection and reduced vulnerability:

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601 Adopted 1 July 1949; entered in force 22 January 1952; ratified so far by 53 States: https://www.ilo.org/dyn/normlex/fr/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242.

602 Adopted 16 June 2011; entered into force 5 September 2013; ratified so far by 36 States: https://www.ilo.org/dyn/normlex/fr/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460

603 Adopted by the UN General Assembly on 11 December 1969, Resolution 2542 (XXIV).

Social protection systems should be based on legislation and, as appropriate, strengthened and expanded, as necessary, in order to protect from poverty people who cannot find work; people who cannot work due to sickness, disability, old age or maternity, or to their caring for children and sick or older relatives; families that have lost a breadwinner through death or marital breakup; and people who have lost their livelihoods due to natural disasters or civil violence, wars or forced displacement [...].[604]

2. At the Regional Level

The ***American Declaration of the Rights and Duties of Man*** (Art. XVI) and the ***Protocol of San Salvador*** (Art. 9) recognize the right to social security. The ***American Convention on Human Rights*** does not explicitly recognize the right to social security but does enshrine protection of the family (Art. 17) and the right of the child to protection measures (Art. 19).

The ***Revised European Social Charter*** also recognizes the right to social security (Art. 12), the right to medical and social assistance (Art. 13) and the right to social services (Art. 14).

The ***African Charter on Human and Peoples' Rights*** does not explicitly mention the right to social security. On the other hand, it requires States parties "to protect the health of their people and to ensure that they receive medical attention when they are sick" (Art. 16.2); and to protect the family, ensure "the protection of the rights of women and the child" and take "special measures of protection" regarding the physical and moral needs of the aged and the disabled (Art. 18). The ***African Charter on the Rights and Welfare of the Child*** does not mention explicitly the right to social security either, but it does provide for special protection measures for disabled children (Art. 13), for health care for children and pregnant and/or

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[604] *Declaration and Programme of Action of the World Summit for Social Development*, Copenhagen, March 1995, § 38.

breastfeeding women (Art. 14). Regarding the ***Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa***, it enjoins its States parties to "establish a system of protection and social insurance for women working in the informal sector and sensitize them to adhere to it" (Art. 13.f).

C. States' Specific Obligations regarding the Right to Social Security

The comments in the present chapter, drawn mainly from *General Observation No. 19* of the CESCR (2007), may appear theoretical when one takes into account the real capacities of States today. The implementation of structural adjustment programs (SAPs) and neoliberal policies over more than four decades, imposed through the International Monetary Fund and the World Bank initially upon the countries of the Global South and, over the last ten years or more, on those of the North, have resulted, in particular, in the imposition of a market economy throughout the world and the reinforcement of the power of transnational corporations. States emerge from this process noticeably weakened, as intended by those imposing these programs. Forced by foreign debt in particular but also by the need to avoid being isolated in the economic and political sphere, most States have ended up renouncing their sovereignty over economic and trade matters, effectively relinquishing their political independence (see the chapter on self-determination.) However, it was possible (and it still is) to to oppose SAPs and bilateral or multilateral free-trade agreements that impinge on citizens' basic rights by invoking States' economic, social and cultural rights obligations, as the CESCR has repeatedly asserted during its consideration of States' periodic reports and in its *General Observation No. 19* (see below.) For social and grassroots movements it is a matter of forcing their governments to do so.

As we have just seen, as a human right enshrined in international and regional treaties, the right to social security is a legal obligation for States. Consequently, as in the case of the other human rights, States are under obligation to ***respect***, ***protect*** and ***implement*** the right to social security.

The obligation to ***respect*** the right to social security implies that States must refrain from all arbitrary measures that might impede (directly or indirectly) the exercise of this right. It is a negative obligation, prohibiting States from exercising their power when it would have a deleterious effect on the enjoyment of the right to social security. A government violates this obligation, for example, when it "denies or limits equal access to adequate social security."[605]

The obligation to ***protect*** means that States must take measures to prevent third parties (individuals, groups, private business enterprises or other entities) from impeding the exercise of the right to social security. For example, the CESCR has no position on the nature of social security systems (public, private or mixed), but it reminds States of their responsibility in the administration and supervision of these systems:

> *Where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security. To prevent such abuses an effective regulatory system must be established which includes framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance.*[606]

The obligation to ***implement*** requires that States take all necessary measures (legislative, administrative, financial; the drafting and

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[605] CESCR, General Comment No. 19, § 44.

[606] Ibid., § 46.

enactment of policies and programs, etc.) and create a social security system to ensure the enjoyment of this right for everyone.

In this regard, the Committee on Economic, Social and Cultural Rights reckons that "States parties have immediate obligations in relation to the right to social security", [...] [that they] should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level."[607] It recalls that the International Covenant on Economic, Social and Cultural Rights prohibits "retrogressive measures taken in relation to the right to social security"[608] and that States "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."[609]

This is why States parties to the ICESCR or any other international or regional convention that recognizes explicitly the right to social security, have the ***obligation to incorporate it into their national legislation***, unless – depending on the legal system of the State – the treaties are automatically applicable at the national level. In this way, the citizens of these States can appeal to national, regional and international jurisdictions in the event of a violation of the right to social security. The CESCR requires that States take all necessary measures so that every person or group has "access to effective judicial or other appropriate remedies at both national and international levels."[610] The Committee also recalls that all persons whose right to social security has been violated "should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition."[611]

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607 Ibid., §§ 40, 41.
608 Ibid., § 42.
609 Ibid., § 59.
610 Ibid., §77.
611 Ibid.

1. Questions of Means and Resources at the National Level

Generally, the social security systems in use in many countries (designed as insurance covering various areas of social security) are run with parity contributions from employers and employees, given that they are usually linked to employment. Leaving aside the matter of unemployment (more than 200 million persons worldwide, according to the ILO), theoretically it is not difficult to set up everywhere in the world a social security system for the overwhelming majority of humanity. The problem is that many jobs pay less than the minimum wage (variously defined, or not, depending on the country) and do not allow the workers in many countries to live decently and thus contribute to a social security scheme. This is the situation of the *working poor*, whose numbers are in the millions across the world, even though most of them work full-time! In the context of neoliberal globalization, precarious employment (temporary or short-term, part-time, on call etc.) proliferates when jobs are eliminated (by the millions!) owing to, inter alia, relocation[612] and technological progress.[613] Moreover, that does not even take into account those in the so-called informal economy or the "self-employed" such as peasants – though they too are subjected to the laws of the "market", which are crushing them. In the end, one arrives at an remarkable number of persons excluded from all social security systems.[614]

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612 Although in recent years certain Western States seem to have started rethinking their offshoring policies, (cf. the US-China trade war), the trend remains very limited.

613 Although the widespread robotization/automation of the production of goods and services, called (wrongly?) "artificial intelligence", is under way, it is running up against not only its own limits but also the lack of natural resources needed to make it work.

614 According to the ILO, only 30% of the world's population benefit from proper social coverage, and 53% have none at all. The rest (some 17%) benefit only partially from certain forms of coverage. See the World Social Protection Report 2020-22: https://www.ilo.org/publications/flagship-reports/world-social-protection-report-2020-22-social-protection-crossroads-pursuit

It is true that certain States attempt to remedy this deficit as best as they can with social assistance, but such efforts are more and more under attack from structural adjustment programs imposing austerity in this area. Other States, through a neoliberal ideological choice, simply cut social budgets, on the grounds that, to the followers of this ideology, individuals are responsible for themselves and should thus shift for themselves as independent agents who need only make their way in the marketplace.[615] Obviously, if each person owned property or capital, the matter of social insurance would not be crucial, but this is far from being the case. In our times, the richest one percent of the world's population controls some 50% of the wealth. As Robert Castel has observed, this central matter has absolutely not been taken into account in the building of the liberal State.[616]

Clearly, the resources necessary for setting up a universal social security system must be available. Some States are quick to use this as an argument, rightly or not, to justify the non-implementation of economic, social and cultural rights. These States very often refer to a particular passage in Article 2.1 of the ICESCR, which stipulates that the rights listed in the treaty are to be implemented "progressively". However, they ignore the fact that the same article stipulates that each State must use "the maximum of its available resources" to honor its economic, social and cultural rights commitments; and that the implementation of these rights is a duty of all States parties to the ICESCR, given that each State must act as much through its own efforts as through international assistance and cooperation. ***It is thus possible for a State lacking means and resources to appeal to international solidarity in these areas.***

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615 Francine Mestrum & Melik Özden, *The fight against poverty and human rights*, (Geneva: CETIM, 2012): https://www.cetim.ch/legacy/en/documents/report_11.pdf

616 Robert Castel, L'insécurité sociale: Qu'est-ce qu'être protégé? (Paris: Seuil, 2003), p. 27.

In this context, inevitably, there are the matters of social organization, economic, trade and tax policies, the redistribution or sharing of wealth and the management of the social security system. For States with the means, the question is whether they are genuinely and sufficiently mobilized in favor of the implementation of a social security system. Hence, the ICESCR draws a distinction between inability and unwillingness in States' commitment to honor their economic, social and cultural rights obligations.[617]

2. States' International Obligations

As emphasized above, States are required (individually and collectively) to ensure the realization of economic, social and cultural rights, including the right to social security. Thus, this is not only a national but also an international obligation. In this regard, States "should facilitate the realization of the right to social security in other countries, for example through provision of economic and technical assistance."[618] In line with that logic, States must refrain "from actions that interfere, directly or indirectly, with the enjoyment of the right to social security in other countries."[619] They are also duty-bound to prevent ***"their own citizens and national entities from violating this right in other countries."***[620]

It is all too clear that States' practices run counter to their international economic, social and cultural rights obligations, including the right to social security, for example when negotiating trade agreements or imposing structural adjustment programs on indebted countries. This is why the CESCR warns States that ***international and regional agreements should not "adversely impact upon the right to social security"*** and that ***"agreements concerning trade liberalization should not restrict the capacity of a State Party***

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617 See, inter alia, CESCR, General Comment No. 14, § 47.

618 CESCR, General Comment No. 19, § 55.

619 Ibid., § 53.

620 Ibid., § 54, emphasis added.

[to the ICESCR] to ensure the full realization of the right to social security."[621]

It is similar for member States of the ***international financial institutions*** (IMF, World Bank and regional development banks, in particular) which ***"should take steps to ensure that the right to social security is taken into account in their lending policies, credit agreements and other international measures."***[622]

The CESCR also reminds States of their responsibility in the design and implementation of ***structural adjustment policies*** and social security schemes by the international financial institutions. According to the Committee, these policies and practices "***should promote" and "not interfere with the right to social security."***[623]

By extension, one might add that States should take urgent measures against stock market speculation, especially in the case of pension funds. With a estimated capitalization of US$ 36,000 billion, (according to a 2014 study),[624] pension funds constitute the biggest actors in the world's financial markets and have been exploited for 30 years as a means of carrying out lucrative transactions, mainly for the benefit of intermediaries and brokers. In this broader context, the Committee specifies that ***public authorities should consider social security "a social good, and not primarily [...] a mere instrument of economic or financial policy."***[625] In this regard, in a study on world economic and financial crises, the United Nations Special Rapporteur on Human Rights and Extreme Poverty requests that, inter alia, States regulate "the actions of banking and financial sector entities under their control, in order to prevent them from violating or

621 Ibid., § 57, emphasis added.
622 Ibid., § 58, emphasis added.
623 Ibid., emphasis added.
624 https://www.latribune.fr/entreprises-finance/banques-finance/20150210trib0eedfaea2/les-fonds-de-pension-mondiaux-depassent-le-montant-record-de-36-000-milliards-de-dollars.html
625 CESCR, General Comment No. 19, § 10, emphasis added.

infringing upon human rights."[626] The Special Rapporteur also recommends the establishment of a minimum level of social protection, promotion of employment and decent work, the overhaul of the fiscal system in the public interest, and the implementation of economic, social and cultural rights.[627] One might also note that the Special Rapporteur recently also recommended setting up a global fund for social protection,[628] while acknowledging that its implementation would be an arduous task.

3. Failures of States in Their Obligations Relative to the Right to Social Security

Given that States, to the maximum of their available resources, "must show that they have taken the necessary steps towards the realization of the right to social security, […] failure to act in good faith to take such steps amounts to a violation of the Covenant [on Economic, Social and Cultural Rights]."[629] The CESCR also requires that the implementation of this right "complies with human rights and democratic principles" and "is subject to an adequate framework of monitoring and accountability."[630]

According to the CESCR, failure by States in the implementation of social security rights may take the form of actions (e.g. adoption of deliberately regressive measures; suspension of legislation covering the right to social security; active support of measures adopted by a third party that violate the right to social security)[631] or omissions (e.g. failing to take measures to ensure the right to social security;

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626 A/HRC/17/34, 17 March 2011, § 83.

627 Ibid, pp. 6, 16 to 20.

628 See *Global fund for social protection: international solidarity in the service of poverty eradication* – Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/47/36, 22 April 2021.

629 CESCR, General Comment No. 19, § 62.

630 Ibid., § 63.

631 Ibid., § 64.

failing to enforce pertinent legislation; neglecting to ensure the financial viability of pension schemes).[632]

D. Examples of Implementation

1. At the National Level

Although the right to social security is enshrined in many national constitutions and there are, in many countries, social insurance schemes (with varying practices and effectiveness), the reality is quite different for the majority of people. According to the ILO, only 30% of the world's population benefits from proper social coverage, and more than 50% have none at all.

It should be noted that the creating of a social security system is linked in particular to history, to compromises among social groups and to the capacities (economic and technical, especially) of each country. It should also be noted that, generally, social security systems very often exclude the most vulnerable persons in a given society (the unemployed, those with insecure jobs, migrant workers, asylum seekers, etc.) and that States do not always take their responsibility in the management and supervision of social insurance schemes (pension funds in particular) entrusted to private entities.

Moreover, whatever the ratio of the employer's to the -employee's shares of social insurance contributions it is - it goes without saying - covered by the wage. Yet numerous employers refuse to pay a decent wage and provide social protection to their workers. A study has shown that 10 % of the wealth derived from labor was transferred to capital between 1987 and 2012 in the 15 richest OECD countries.[633]

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632 Ibid., § 65.

633 Pierre Larrouturou, *C'est plus grave que ce qu'on vous dit... mais on peut s'en sortir*, Nova, 2012, quoted in *L'événement syndical*, No. 46, 14 November 2012.

That said, most States have ratified many of the ILO and human rights conventions. The majority have also incorporated them into national legislation. In several countries, there is a social security system covering various areas, though these vary in effectiveness and performance. As most social insurance schemes are linked to employment, labor tribunals, available in many countries, can deal with litigation regarding such matters. It is also possible, depending on the case, to appeal to regular courts (an administrative tribunal, for example) or to a supreme court, by basing a case on international human rights instruments, to force the respect of the right to social security.

2. At the Regional Level

In 1978, Kjartan Ásmundsson, a citizen of ***Iceland*** born in 1949 and residing in Reykjavík, seriously injured on a fishing boat, had to abandon fishing and was assessed to be 100% disabled, thus incapable of working at his trade. After the accident, he was hired by a transport company, Samskip Ltd, as an office worker. In 1992, due to a change in the law, the criteria for assessing the claimant's disability pension were altered, such that it was no longer his ability to work at his previous trade that was assessed but his ability to do any work at all. The new provision was introduced because of the financial difficulties of the pension fund. Under the new rules, the claimant's disability was reassessed and the loss of overall ability was calculated at 25%, i.e. below the required minimum of 35%. Consequently, from 1 July 1997, the pension fund stopped paying the disability pension and concomitant child support that he had been receiving for almost 20 years. In all, he lost pension rights (disability and annual child care support) amounting to 12,637,600 Icelandic crowns. On 31 May 2000, he took his case to the ***European Court of Human Rights***, invoking Article 1 of Protocol No. 1 (protection of property), taken separately and combined with Article 14 (prohibition of discrimination) of the European Convention on

Human Rights. He challenged the decision to cancel his disability pension. In its ruling of 12 October 2004, the Court judged that the plaintiff could validly plead that it was legitimate for him to expect that his pension would continue to be evaluated in function of his disability to carry on his previous work. It should be noted that he lost his pension on 1 July 1997 owing, not to a change in his personal situation, but to legislative amendments that changed the disability assessment criteria. Although he had been assessed as 25% disabled in respect of any work at all, he was deprived of all rights to a disability pension. In these conditions, the Court judged that he was obliged to support an excessive and disproportionate burden that could not be justified by the legitimate interests claimed by the Icelandic authorities. It would have been different if he had had to accept a reasonable and proportionate reduction of his pension rights rather than being totally deprived of these rights in violation of Article 1 of Protocol No. 1. On this basis, the Court ordered the State to pay the plaintiff € 75,000 in material damages, € 1,500 for moral damage and € 20,000 for costs and expenses.[634]

In 2012, several trade unions and pensioners' federations in ***Greece*** separately filed several collective complaints with the ***European Committee of Social Rights*** against the Greek State. They complained that their political authorities had adopted laws imposing a reduction of retirement pensions for all schemes (public and private). They alleged that these laws had been adopted in violation of Articles 12, §3 (right to social security) and 31, §1 (right to adequate housing) of the European Social Charter (1961). In its 7 December 2012 ruling, the Committee judged that there had been a violation of Article 12, §3. In the Committee's view, "even when reasons pertaining to the economic situation of a State party make it impossible for a State to maintain their social security system at the level that it had previously attained, it is necessary by virtue of the

634 *Case of Kjartan Ásmundsson v. Iceland*, October 12, 2004, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67030%22]}

requirements of Article 12 §3 for that State party to maintain the social security system on a satisfactory level that takes into account the legitimate expectations of beneficiaries of the system and the right of all persons to effective enjoyment of the right to social security."[635]

In a complaint against ***Belgium***, the International Federation for Human Rights (FIDH) deplored the situation of severely dependent disabled adults and their families, who lacked shelter and housing. The FIDH alleged that Belgium was not satisfactorily implementing Articles 13 (right to social and medical assistance), 14 (right to benefit from social services), 15 (rights of the disabled), 16 (right of the family to social, legal and economic protection), interpreted separately or in combination with Article E (non-discrimination) of the European Social Charter (revised 1996). In its 18 March 2013 ruling, the European Committee of Social Rights judged that there was a violation of Article 14, Article 16 and Article 30 (right to protection against poverty and social exclusion).[636]

In its 23 August 2018 ruling, the ***Inter-American Commission of Human Rights*** noted that ***Guatemala*** had violated the right to health (Article 26 of the Convention) of 39 persons with HIV/AIDS by not meeting its obligation to provide them with available, accessible and high quality health care.[637]

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635 *Panhellenic Federation of Public Service Pensioners (POPS) v. Greece*, Case No. 77/2012, § 64, https://hudoc.esc.coe.int/eng/#{%22sort%22:[%22escpublicationdate%20descending%22],%22escdcidentifier%22:[%22cc-77-2012-dmerits-en%22]}

636 *International Federation for Human Rights (FIDH) v. Belgium*, Case No. 75/2011: https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-75-2011-international-federation-of-human-rights-fidh-v-belgium.

637 *Case of Cuscul Pivaral et al. v. Guatemala*, Judgment of 23 August 2018, https://www.corteidh.or.cr/docs/casos/articulos/seriec_359_ing.pdf.

3. At the International Level

In 1983, the Fédération générale du travail de Belgique (FGTB – Belgian General Labor Federation), invoking Article 24 of the ***ILO*** Constitution (Representations of non-observance of Conventions), filed a complaint alleging the non-execution by the government of ***Belgium*** of, inter alia, the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102), and in particular of its Article 68 on equality of treatment of non-national residents. The complaint concerned the exclusion from social security of executives and researchers of foreign nationality working for business enterprises set up in a special employment zone, for the duration of their employment. In its 22 February 1984 ruling, the Tripartite Committee judged that the exclusion of certain foreign workers from the applicable Belgian social security system was in violation of Article 68, paragraph 2, of that Convention. The Committee requested, inter alia, that the Belgian government "supply full information on the application of the provisions called in question in order to enable the Committee of Experts on the Application of Conventions and Recommendations to ensure that national law and practice are consistent with the provisions of Convention No. 102."[638]

An explosion occurred in the Pasta de Conchos mine, in the municipality of Sabinas in the State of Coahuila, Mexico, on 19 February 2006, trapping 65 miners in the mine. Subsequently, the bodies of only two of them were recovered. The national union of bridge and road workers and affiliated services of Mexico (SNTCPF) accused the Mexican authorities of "serious shortcomings in the manner in which the Government has monitored compliance with safety and health measures, working conditions and preventative measures," in spite of the dangers of the mine, known for over a

[638] *Reclamation (Article 24) Belgium, C001, C004, C006, C014, C0041, C087, C089, C098, C102 – 1984*, https://normlex.ilo.org/dyn/normlex/fr/f?p=1000:50012:0::NO::P50012_LANG_CODE:en:NO

century (1,500 miners killed from 1889 to 2000). The SNTCPF asserted that only two work inspectors were responsible for overseeing 129 underground coal mines, employing 6,970 miners in the state of Coahuila; serious deficiencies and inadequate follow-up of the deadlines for routine inspection and checks; shortcomings in the mine's ventilation system; deficiencies in the electric equipment; structural defects… On 2 March 2006, the SNTCPF filed a complaint alleging the non-implementation by the government of ***Mexico*** of the Labour Inspection Convention, No. 81 (1947); the Labour Inspectorates (Non-Metropolitan Territories) Convention, No. 85 (1947); the Labour Administration Convention, No. 150 (1978); the Occupational Safety and Health Convention, No. 155 (1981); the Chemicals Convention, No. 170 (1990); the Prevention of Major Industrial Accidents Convention, No. 174 (1993); and the Safety and Health in Mines Convention, No. 176 (1995).

In its 19 March 2009 ruling, the Tripartite Committee dealt with the points regarding Conventions No. 150, No. 155 and No. 170, requesting that the Mexican government take, inter alia, the following measures:

- ensure full compliance with Convention No. 155, and, in particular, continue to review and periodically examine the situation as regards the safety and health of workers;
- adopt the new regulatory framework for OSH in the coal mining industry (safety and health requirements);
- ensure, by all necessary means, the effective monitoring of the application in practice of laws and regulations on occupational safety and health and the working environment, through an adequate and appropriate system of labor inspection;
- monitor closely the organization and effective operation of its system of labor inspection ;

- ensure [...] that adequate and effective compensation is paid, without further delay, to all the 65 families concerned and that adequate sanctions are imposed on those responsible for this accident;
- […] strengthen the application of its laws and regulations in the area of occupational safety and health in mines.

The Committee further requested that the ILO Governing Body "entrust the Committee of Experts on the Application of Conventions and Recommendations with following up the questions raised in this report with respect to the application of the Labour Administration Convention, 1978 (No. 150), the Occupational Safety and Health Convention, 1981 (No. 155), and the Chemicals Convention, 1990 (No. 170)."[639]

During its consideration of the fourth periodic report of ***Argentina*** (2018), the ***CESCR*** expressed, inter alia, the following concerns: persons working in the informal sector "are not properly protected by labour laws and, in particular, cannot exercise their right to social security"; the existence of "barriers to migrants' regularization and access to social services"; harmful effects of Law No. 27426 of 2017 on the re-evaluation of retirement pensions and family allocations; the widespread suspension of non-contributory pensions for the disabled; the structural poverty affecting over 5 million children and adolescents. In light of these concerns, the Committee requested that Argentina restore the suspended pensions; "reinstate the adjustment formula specified in Act No. 27160 and to ensure that all future measures concerning pensions comply with the principle of non-retrogression in the beneficiaries' enjoyment of economic, social and cultural rights, in particular with regard to non-contributory pensions and disability pensions." It further called for the strengthening of social measures by emphasizing the universal

[639] Representation (Article 24) – Mexico – C150, C155, C170 – 2009, §§1, 12, 13, 15 to 19, 22, 23, 24, 99, https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507359,en

dependent child allocation paid to almost 60% of the country's rural population. The Committee also requested that persons working in the informal economic sector be integrated into the formal economy "to ensure that they are covered by labour laws and have access to social protection." It additionally requested the removal of "legal and administrative barriers to migrants' access to coverage under social policies" so that they may benefit from the Universal Child Allowance and "ensure that humanitarian assistance is provided to migrants in situations of vulnerability."[640]

Concerned by the persistence of "trafficking in persons, sexual abuse and sexual exploitation, […] the prevalence of child labour, [...] labour exploitation and forced labour, in particular those concerning workers of Haitian origin, especially in the sugar industry" in the ***Dominican Republic***, the ***Human Rights Committee*** requested the country's authorities "to combat trafficking in persons, sexual abuse and sexual exploitation", by effectively implementing the measures they had taken for this purpose. It also requested that the government "intensify its efforts to prevent and reduce child labour and forced labour, especially in the area of domestic work and farming."[641]

Following its consideration of the periodic report of ***Canada*** (2017), the ***Committee on the Elimination of Racial Discrimination*** requested, inter alia, that the authorities "reform current policies and measures to ensure protection of temporary migrant workers from exploitation and abuse and grant them access to health services and employment and pension benefits", as well as to "implement

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640 Concluding Observations on the periodic report of Argentina, E/C.12/ARG/CO/4, 1 November 2018, §§ 26, 27, 35 to 38, 43.

641 Human Rights Committee, Concluding Observations on the periodic report of the Dominican Republic, CCPR/C/DOM/CO/6, 27 November 2017, §§ 19, 20: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FDOM%2FCO%2F6&Lang=en

protective policies for migrant workers."[642] It further requested that the government "address the specific situation of members of ethnic minorities and indigenous peoples with disabilities who face multiple and intersecting forms of discrimination. The Committee recommends that the State party create a strategy, in consultation with indigenous peoples, to ensure that indigenous persons with disabilities have equal access to quality services."[643]

Social Security as a Defense against Poverty and Inequality

> Creating a social security system is more and more considered an indispensable and effective measure in the fight against poverty and inequality, as recognized by, among others, the ILO: "social security is an important tool to prevent and reduce poverty, inequality, social exclusion and social insecurity, to promote equal opportunity and gender and racial equality, and to support the transition from informal to formal employment; [...]."[644]
>
> The United Nations Special Rapporteur on Human Rights and Extreme Poverty has studied the effect of social pensions (also called non-contributory pensions) on the living conditions of the elderly, concluding that "non-contributory pensions can significantly reduce poverty and vulnerability among old people."[645]

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642 Concluding Observations on the periodic report of Canada, CERD/C/CAN/CO/21-23, 13 September 2017, § 34: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CERD%2FC%2FCAN%2FCO%2F21-23&Lang=en

643 Ibid, § 26.

644 ILO Recommendation No. 202, Social Protection Floors Recommendation, § 4 of the Preamble.

645 A/HRC/14/31, 31 March 2010, presented to the 14th session of the Human Rights Council.

That said, and as already emphasized above, existing social security systems throughout the word are mostly linked to employment, i.e. an income. This has inevitable consequences on social insurance schemes, which continue to function on the basis of "full employment" and full-time work. The unemployed, insecure workers, pregnant women, the aged, children, the disabled and the so-called "self-employed" (such as peasants, fishers, artisans and small shopkeepers, ground down by the "laws of the market"), who constitute the overwhelming majority of humanity, find themselves excluded from any social protection worthy of the name, given that they subsist on less than US$ 2 per day, according to World Bank figures.

The World Bank's calculation is questionable for "it is not based on any direct assessment of the cost of essential needs".[646] The Special Rapporteur goes further in his criticism, pointing out that the international poverty line is explicitly designed to reflect a staggeringly low standard of living, well below any reasonable conception of a life with dignity. […] This standard is a world apart from the one set by human rights law and embodied in the Charter of the United Nations.[647] He adds that "Between 2010 and 2014, 122 countries reduced expenditure on social protection as a percentage of GDP. The majority of OECD countries reduced their social spending between 2015 and 2018".[648]

Worse, in the current context of neoliberal globalization, this situation is anything but reassuring, given that extreme flexibility (in terms of working hours and conditions) and unlimited mobility on the labor market (within any given country but also internationally and among various economic sectors) are demanded by employers, not to mention the uberization of the

646 Report of the Special Rapporteur on Human Rights and Extreme Poverty, A/HRC/44/40, 19 November 2020, § 9.

647 Ibid., § 12.

648 Ibid., § 73; Note 131.

economy which places all costs and responsibilities on the shoulders of the workers though they are totally dependent on digital work platforms. (See the chapter on the right to work.)

The aging of the population (notably in Asia and in the West) constitutes another major challenge for the social security system.[649] But political proposals in this area, for the time being, focus chiefly on increasing the retirement age, without any in-depth reflection on the overall management and functioning of pension plans. (See the example of Enron, below.)

In this context, we must question the pertinence of making social security dependent on a job, for income remains the determining element for setting up a social security system under the current approaches. Indeed, more and more voices are being raised in civil society to plead for an unconditional universal income for everyone.[650] It is true that the variations proposed until now have been highly diverse (e.g. minimum income, citizenship income, universal allocation, guaranteed social income) and relate to different concepts.[651] Moreover, some proposals have a

[649] Japan claims the oldest population in the world, with over 22% of its people aged 65 or over. According to the International Social Security Association (ISSA), the portion of the population over 65 will double in Europe over the next 40 years, and it will even triple in Asia (see the ILO press release of 10 September 2012: https://www.ilo.org/resource/article/are-we-getting-too-old-afford-social-security

[650] See, inter alia, the *Declaration of the Asia Europe People's Forum*, adopted at its ninth session in Laos (October 2012). In Switzerland, a people's initiative "For an unconditional basic income" was unsuccessfully put to a vote in 2016. Another initiative is in preparation putting "the accent on financing and the preservation of social insurance" (our translation). Le Temps, 21 September 2021: https://www.letemps.ch/suisse/une-nouvelle-initiative-relancer-lidee-dun-revenu-base-inconditionnel.

[651] See in this regard, inter alia, Robert Castel, op. cit.; Yannick Vanderborght, "Quelles sont les chances politiques de l'allocation universelle? Hypothèses à partir des exemples canadien et néerlandais [What are the political prospects of universal benefit? Hypotheses based on the Canadian and Dutch examples]", in *Raisons politiques*, 2002/2, No. 6, pp. 53-66: http://www.cairn.info/revue-raisons-

tendency to move in the opposite direction of what is desired. A minimum income, for example, risks putting downward pressure on earnings and weakening, or even eliminating, the role of trade unions or increasing control and surveillance of the population.

On this last point, the UN Special Rapporteur also proposes to "replace or supplement existing social protection systems with a universal basic income" in one of his reports, in which his intention is "to reflect on the desirability of advocating a basic income approach to social protection when viewed from the perspective of international human rights law."[652]

We must beware of undermining the right to social security. As we have already mentioned, it is a fundamental human right that must be universalized, whether or not it is linked to employment. The ILO's new proposals for the introduction of so-called universal social security aim precisely to give protection to people outside the labor market, so that the social protection-employment nexus is supplemented by extensive rights already recognized by the UN (see above). At the moment it is the conditional cash transfers model that is being promoted by certain influential international development organizations.[653]

Let us leave the last word to the UN Special Rapporteur on extreme poverty and human rights: "Poverty is a political choice and will be with us until its elimination is reconceived as a matter of social justice."[654]

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politiques-2002-2-page-53.htm.

652 Report of the Special Rapporteur on Extreme Poverty and Human Rights, A/HRC/35/26, 22 March 2017.

653 See, inter alia, Francine Mestrum, "Social Protection Floor : beyond poverty reduction?": https://www.globalsocialjustice.info/2022/07/01/social-protection-floor-beyond-poverty-reduction/

654 Report of the Special Rapporteur on human rights and extreme poverty, A/HRC/44/40, 19 November 2020, §85

The Enron Example

Besides the stock market speculation already mentioned, the management of retirement funds by private entities is also highly problematic, as demonstrated by the retirement funds invested in the American company Enron, which is undoubtedly a textbook case. As an energy company, Enron was ranked as the seventh biggest company in the United States (according to its declared turnover) before it went bankrupt in December 2001, triggering a cascade of lay-offs and pension losses for hundred of thousands of persons. Here follows a brief summary of the story of accounting fraud and stock market speculation on a grand scale.

"On 2 December 2001, the multinational filed for bankruptcy. The share price dropped from US$ 90 to US$ 1 in several months. Some 5,000 workers were immediately laid off while hundreds of thousands of small savers, who had entrusted their life savings to Enron (roughly two thirds of the firm's capital was held in pension or mutual funds), lost the bulk of their retirement capital. Criminal proceedings were opened against the company's managers. The treasurer, Ben Glisan, was sentenced to five years in prison and the chief financial officer, Andrew Fastow, to ten years. On 25 May 2006, Kenneth Lay, the chief executive officer, 64 years old, convicted on six counts, including fraud and conspiracy, was sentenced to 75 years in prison, but he died from a heart attack in his cell before starting to serve his sentence."[655] The company's former No. 2, Jeffrey Skilling, found guilty of financial fraud, insider trading and manipulation of the accounts for having hidden Enron's real situation was sentenced to 24 years in prison in 2006, but he was freed in 2018, under a deal that reduced his sentence to 14 years…[656]

[655] [Our translation] https://www.cairn.info/le-roman-vrai-de-la-crise-financiere--9782262031015-page-82.htm

[656] Cf. *Le Devoir*, 1 September 2018, https://www.ledevoir.com/economie/535841/l-ex-directeur-general-d-enron-sort-de-prison

CHAPTER 7

THE RIGHT TO EDUCATION

While its content and its practical modes of application have been the subject of debate for eons and have evolved (or been adapted) with time and location, the necessity of education for all is not in dispute. The same can be said for formal schooling, which has become the norm in the contemporary world, even though one does not learn only in school (family, work, even prison can be a formative framework) and some have dreamed of a world without school.[657]

However, this apparent unanimity cannot hide divergences regarding the ultimate purpose of education: what education and why? Is it to train "producers" or to train "citizens"?[658]

These two aspects of education are not necessarily contradictory. Rather, they are complementary, given that training citizens makes it possible for everyone to take part in decision-making in any given society regarding essential questions posed by production (for whom? why? what or how to produce?).

For proponents of neoliberal policies, education must above all serve the economy, be oriented to technical subjects, and be carried out – as much as possible – by private agents, including transnational corporations, and at the expense of those being educated. These policies have been imposed almost everywhere in the world for over three decades and have tended not only to negatively influence the quality of education but to increase exclusion and inequality in this area overall.

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657 Ivan Illich, *Deschooling Society*. (London: Marion Boyars, 1971).

658 Samir Amin, Preparatory notes presented to the Council Assembly of the World Forum for Alternatives (WFA), Caracas, October 2008.

The educational programs thus implemented tend to weed out from the educational arena the teaching of not only human rights but also subjects such as history, geography, philosophy and the arts, all considered superfluous. It is telling that the OECD's PISA assessment regarding the attainment of 15-year-olds deals exclusively with "reading, mathematics and science knowledge".[659]

These tendencies are a threat to democracy, for high quality teaching is limited to a select few, while the education reserved for the rest of society reproduces social inequality.[660] In such a context, increase of access to schooling does not necessarily translate into democratization of education, nor does it guarantee the quality of the education provided.

One need only refer to the existing human rights treaties to see that there is no question but that education should train responsible citizens for participation in the governing of society, citizens endowed with the ability to think critically about national and international problems and about values such as respect for human dignity, the natural environment, diversity, peace, solidarity, etc.

In this regard, one should bear in mind that education is often seen as a means to an end (for example a better job or higher earnings), overlooking that education is above all a human right and an end in itself.

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[659] Since 2000, the PISA assessment has been carried out every three years among 15-year-olds in the 38 OECD member States and in many partner countries (https://www.oecd.org/pisa/). In 2022, 83 countries participated: https://www.oecd.org/pisa/aboutpisa/pisa-2022-participants.htm .

[660] Ferran Ferrer, Professor of comparative education, Autonomous University of Barcelona (Spain), E/C.12/1998/20.

A. Definition, Purpose and Content of the Right to Education

The right to education is recognized in numerous international human rights instruments, but the texts defining most thoroughly the content and scope of this right are the *Universal Declaration of Human Rights, the ICESCR and the Convention on the Rights of the Child.*

As Article 13.1 of the ***ICESCR*** reiterates almost word for word the content of Article 26.2 of the Universal Declaration of Human Rights, it suffices to quote the Covenant.

> *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

Under Article 29.1 of the ***Convention on the Rights of Child***,

> *States Parties agree that the education of the child shall be directed to: (a) the development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples,*

ethnic, national and religious groups and persons of indigenous origin; (e) the development of respect for the natural environment.

The chief United Nations bodies entrusted with overseeing implementation of the right to education have provided further clarifications to the definition of this right.

According to the ***CESCR***:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[661]

For the ***Special Rapporteur on the Right to Education***,[662]

Education has a characteristic quality that enables it to be present in and to nourish all areas of life. The interconnectedness of human rights is nowhere more obvious than in educational processes, so the right to education is, moreover, an individual guarantee and a social right which is fully expressed by the individual in the exercise of his or her citizenship.[663]

As for **UNESCO**, it defines education as follows:

The word "education" implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge. This process is not limited to any specific activities.[664]

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661 CESCR, General Comment No. 13, E/C.12/1999/10, 8 December 1999, § 1.

662 The authors of the reports cited in this chapter are (in chronological order): Ms. Katarina Tomaševski (1998-2004) and Mr. Kishore Singh (2010-2016).

663 Report submitted by the Special Rapporteur on the Right to Education to the sixty-first session of the Commission on Human Rights, E/CN.4/2005/50, 17 December 2004, § 6.

If one refers to the ICESCR (the chief international instrument regarding the right to education), the realization of this right comprises six essential elements: compulsory schooling available free to all (at the primary level); human rights education; freedom for parents and guardians to choose the school (under certain conditions); the possibility for private individuals or moral persons to create and run schools (also under certain conditions); the principle of non-discrimination; and international cooperation.

1. Compulsory and Cost-Free Education?

a) Primary and Basic Education

Under the human rights treaties, primary schooling must be compulsory and free to all. This is made explicit in the ICESCR, whose States parties recognize that, to achieve the full realization of the right to education, "primary education shall be compulsory and available free to all" (Art. 13.2.a).

Further, to those States parties that, in the territory under their jurisdiction (including dependent or occupied territories), have not yet done so, the ICESCR gives two years "to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all" (Art. 14).

The ***Convention on the Rights of the Child*** also requires of States parties that primary schooling be "compulsory and available free to all" (Art. 28.1.a).

Here, one must bear in mind that the age at which children start school (from 4 to 7 years) and the length of compulsory schooling (4, 6, 9 or 12 years) varies from one country to another. Faced with this situation, the Special Rapporteur on the Right to Education proposes

[664] *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*, adopted 19 November 1974 by the UNESCO General Conference, § I.1.a.

that the end of compulsory schooling be set at 15 at a minimum.[665] This corresponds to the minimum age for accession to the labor market, as initially defined by the International Labor Organization.[666] The ILO has even raised this limit to 18 years of age, in Convention No. 182 on the worst forms of child labor.[667]

Moreover, the ICESCR stipulates that "fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education." (Art. 13.2 d)

b) Secondary and Higher Education

Free education is not limited to primary school, and the ICESCR requires that States gradually ensure it for secondary and higher education (Art. 13.2.b and c).

2. Quality

It is well known that adequate buildings and well trained teachers are not enough to guarantee quality education. However, while the content of teaching is key, one must not neglect the conditions and overall process of teaching. These aspects are mutually complementary and reinforcing.

In the Special Rapporteur's view, "the right to a quality education implies a need to direct learning processes and the entire school environment and infrastructure towards the development of knowledge, abilities and skills within a body politic primed to respect dignity and the higher values of humanity, diversity, peace, solidarity and mutual cooperation. Quality cannot be reduced to a

665 E/CN.4/2001/52, 11 January 2001; E/CN.4/2002/60, 7 January 2002.

666 ILO Convention No. 138, adopted 26 June 1973; entered into force 19 June 1976.

667 ILO Convention No. 182, adopted 17 June 1999; entered into force 19 November 2000.

matter of quantifiable efficiency; rather, it encompasses the depth of human commitment to the present and future generations."[668]

With this in mind, the CESCR and the Special Rapporteur on the Right to Education have set four interdependent criteria for measuring the quality of teaching: availability, accessibility, acceptability and adaptability.[669]

a) Availability

Educational institutions and their programs must be sufficient in number. The schools must be well maintained and equipped with electricity, running water, sanitation (for both girls and boys) etc. Properly trained teachers must be paid a salary that is competitive at the national level. The number of pupils per class must not be excessive. The teaching material must be adequate, including – depending on the need – a library, computers and digital material.

In this regard, one should bear in mind Article 13.2.e of the ICESCR, which stipulates: "The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved."

b) Accessibility

Educational institutions and programs must be accessible to everyone, without discrimination (regardless of sex, language, religion, nationality etc.). Teaching must be carried out in a reasonably accessible place (for example a neighborhood school) or by means of modern technology (for example distance teaching).

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668 Annual Report of the Special Rapporteur on the Right to Education, E/CN.4/2005/50, 17 December 2004, §§ 107; 108.

669 The Special Rapporteur set these criteria for primary schools, which was in focus at the start of the mandate; however, the CESCR believes they should be observed at all levels and in all circumstances (see CESCR, General Comment No. 13, § 6; Annual Report of the Special Rapporteur on the Right to Education, E/CN.4/1999/49, 13 January 1999, §§ 51 to 74).

The ***Convention on the Rights of Persons with Disabilities*** requires that States take necessary measures to ensure that "reasonable accommodation of the individual's requirements is provided" (Art. 24.2.c).

c) Acceptability

"The form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) [see above] and such minimum educational standards as may be approved by the State."[670]

To these elements must be added the indispensable teaching in the mother tongue and the "mainstreaming of human rights throughout the contents and process of education."[671] According to the Special Rapporteur, "education should be a free space for the exercise and study of all human rights, responsibilities and capacities",[672] and one must "invest in education not only to facilitate economic development but also, and above all, to build values and knowledge aimed at developing human dignity and proactive citizenship committed to the rights of the individual."[673]

One can further add the ***UNESCO Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms,***[674] which brings additional elements such as the development of a sense of social responsibility and solidarity with

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670 CESCR, General Comment No. 13, § 6.c.

671 Report of the Special Rapporteur on the Right to Education, E/CN.4/1999/49, 13 January 1999, § 13.

672 Report of the Special Rapporteur on the Right to Education, E/CN.4/2005/50, 17 December 2004, § 44.

673 Ibid., § 46.

674 Adopted 19 November 1974.

disadvantaged groups and respect for the principle of equality in daily behavior. According to this Recommendation,

> *Education should stress the inadmissibility of recourse to war for purposes of expansion, aggression and domination, or to the use of force and violence for purposes of repression, and should bring every person to understand and assume his or her responsibilities for the maintenance of peace. It should contribute to international understanding and strengthening of world peace and to the activities in the struggle against colonialism and neo-colonialism in all their forms and manifestations, and against all forms and varieties of racialism, fascism, and apartheid as well as other ideologies which breed national and racial hatred and which are contrary to the purposes of this recommendation. (Arts. III.5 and 6)*

d) Adaptability

"Education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings."[675]

In today's world, it is not uncommon to see in school books and media productions tropes that foment hatred among communities or degrade the image of women. Whatever the heritage of colonialism, patriarchal, religious or cultural traditions, this is neither tolerable nor compatible with the international human rights instruments.

As an example, ***ILO Convention No. 169*** concerning indigenous and tribal peoples in independent countries sets as an objective that "history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples." (Art. 31)

The ***Committee on the Elimination of Discrimination against Women*** (CEDAW) requests States "effectively to adopt education

[675] CESCR, General Comment No. 13, § 6.d).

and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women".[676]

And the ***Committee on the Rights of the Child*** (CRC), recommends that States "change the image of women in the media, in advertising and in school textbooks by adopting suitable messages to combat inequalities, stereotypes and social apathy" and "incorporate teaching on the rights of the child in the school curriculum and in teacher-training programmes".[677]

The adaptability of education is of particular concern for working children. If "learning while earning" programs have been set up, this is because the work of the poor (including children) is a matter of survival. In such conditions, full-time education seems more like a luxury than a basic right of the child, and political will and substantial financial resources are necessary to change this cruel reality. The Supreme Court of ***India*** has accepted the application of this formula for children under 14 for non-hazardous jobs, while requiring that the working time be limited to six hours, with at least two hours of schooling provided by the employer. For dangerous work, the Court recalled that it is not possible to end child labor without tackling the underlying problem of poverty and suggested ensuring employment to an adult member of the family instead of to the child, or, if this is impossible owing to the economic capacity of the State, paying the family a minimum income as long as the child is in school.[678]

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676 CEDAW, General Recommendation No. 3, 7 March 1988.

677 Report of the 8th session of the Committee on the Rights of the Child, CRC/C/38, 20 February 1995, §§ 290, 291 and annex V.3.a).

678 Extracts from the Report of the Special Rapporteur on the Right to Education, E/CN.4/2000/6, § 64.

3. Human Rights Education

As discussed above, the international human rights instruments are unequivocal and require that States integrate human rights education into all levels of schooling. The United Nations human rights oversight mechanisms (especially the CESCR, the Special Rapporteur on the Right to Education and the Committee on the Rights of the Child) constantly remind States of their obligations in this area. Yet rare are the States where human rights have been incorporated into the curriculum at any level, even though the United Nations has been working for more than three decades to make such education a reality.

In 1983, the General Assembly asked UNESCO to foster "the teaching of human rights in all educational institutions, particularly primary and secondary schools, as well as in the training of the professional groups".[679]

In 1988, on the occasion of the fortieth anniversary of the adoption of the Universal Declaration of Human Rights, the United Nations launched a worldwide human rights information campaign.[680] Focused on awareness, information and education, it had as its slogan, "Know human rights, know your rights."[681] The global campaign's objective was to establish a universal human rights culture in which it would be clearly asserted that human rights and basic freedoms are inherent in the human person, without distinction.[682]

In 1993, the World Conference on Human Rights declared "education, training and public information essential for the promotion and achievement of stable and harmonious relations

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679 General Assembly Resolution 38/57, 9 December 1983, § 4.

680 General Assembly Resolution 43/128, 8 December 1988, § 7.

681 United Nations Center for Human Rights, Fact Sheet No. 8, World Information Campaign on Human Rights, Geneva, February 1991.

682 Ibid., p. 2.

among communities and for fostering mutual understanding, tolerance and peace".[683] And it requested that all States "include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings".[684]

In 1994, the General Assembly proclaimed "the ten-year period beginning on 1 January 1995 the United Nations Decade for Human Rights Education".[685] Two years later, the General Assembly adopted "Guidelines for national plans of action for human rights education", which constitute a real-world guide (in general terms, of course) for the efforts of national governments in this area.[686]

Nonetheless, one must acknowledge that all the efforts undertaken by the United Nations in this areas have so far produced meager results. Among the main reasons for this are member States' lack of political will, the lack of resources and specialists, as well as, depending on the country, political instability, corruption, chronic poverty and illiteracy.[687]

The situation had hardly changed by the end of the decade.[688] Perhaps this is why the World Programme for Human Rights Education, launched in 2005, is not time-bound.[689] It is perhaps also

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683 *Vienna Declaration and Program of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, § 78, https://www.ohchr.org/sites/default/files/vienna.pdf

684 Ibid., § 79.

685 General Assembly Resolution 49/184, 23 December 1994, § 2.

686 General Assembly Resolution A/52/469/Add.1 (and corrigendum A/52/469/Add.1/Corr.1), adopted 20 October 1997.

687 A/55/360, 7 September 2000.

688 Report of the High Commissioner for Human Rights, *United Nations Decade for Human Rights Education (1995-2004): Report on achievements and shortcomings of the Decade and on future United Nations activities in this area*, E/CN.4/2004/93, 25 February 2004.

689 *Plan of Action for the First Phase of the World Programme for Human Rights Education*. New York-Geneva: UNHCHR-UNESCO, 2006.

why the United Nations adopted in 2011 a ***United Nations Declaration on Human Rights Education and Training***.[690] Under this declaration, States

> *should ensure adequate training in human rights and, where appropriate, international humanitarian law and international criminal law, of State officials, civil servants, judges, law enforcement officials and military personnel, as well as promote adequate training in human rights for teachers, trainers and other educators and private personnel acting on behalf of the State. (Art. 7.4)*

If used as intended, it is an effective tool in the hands of States and administrations allowing them finally to integrate human rights teaching and training into all levels of education, for all professions and for all generations.

4. Freedom of Parents and Guardians to Choose Schools

Article 13.3 of the ICESCR provides for the right of parents and guardians "to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions".

It is obvious that this freedom is not absolute, for schools must respect the criteria set down by the State, which, in turn, must be in conformity with the above mentioned framework.

5. Freedom of Private Individuals to Set Up and Run Schools

Article 13.4 of the ICESCR also regulates the establishment of private schools: "No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and

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690 United Nations Declaration on Human Rights Education and Training, A/RES/66/137, 16 February 2012, https://documents.un.org/doc/undoc/gen/n11/467/04/pdf/n1146704.pdf?token=x2qhN1Z4uhpIvQteGT&fe=true

direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article [see above] and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

Like parents' and guardians' freedom to choose their children's school, the freedom to set up and run schools is not absolute and is conditioned on the objectives of the right to education. It should be noted in this regard that many not-for-profit educational institutions also fall into the category of private schools – even when they are sometimes financed, partially or entirely, by public funds – by virtue of the fact that they are not run by the State (faith-based schools, schools for people with disabilities, etc.).

It should also be noted that private schools can complement public schools (in such areas as athletic activities and programs in the arts, among others) and can even make possible the preservation of languages, cultures and religions in countries and regions where dominant groups act in a discriminatory – or indeed repressive – manner toward peoples and communities that are part of the State.

6. Non-Discrimination

Non-discrimination is one of the basic non-derogable human rights principles. It is enshrined in several international instruments. This principle is also valid for the right to education. Thus, the Universal Declaration of Human Rights (Art. 26, 27), the International Covenant on Economic, Social and Cultural Rights (Art. 2.2), the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5, 7), the Convention on the Elimination of All Forms of Discrimination against Women (Art. 10), the Convention on the Rights of the Child (Art. 28) and ILO's Indigenous and Tribal Peoples Convention No. 169 (Art. 26) specifically cite this principle.

In this framework, one should mention two other conventions related to the right to education.

The ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*** stipulates: "Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment." (Art. 30)

While the ***UNESCO Convention against Discrimination in Education*** affirms non-discrimination in the area of teaching, Article 2 does not consider discriminatory the setting up of separate educational institutions for the sexes or for religious and linguistic reasons. It is the same for private schools that do not aim for exclusion, but for complementarity. In Article 5, it recognizes that minorities have the right to "to carry on their own educational activities, including the maintenance of schools", but not in a way "which prejudices national sovereignty"! This limitation is problematic, given that many governments continue to use this as a pretext to perpetrate discrimination against national minorities.

For the CESCR, the principle of non-discrimination is unambiguous.

> *The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.*[691]

[691] CESCR, General Comment No. 13, § 31.

7. International Cooperation

International cooperation and aid are enshrined in the ***Charter of the United Nations*** (Art. 55, 56), in the ***ICESCR*** (Art 2.1) and in the ***Declaration on the Right to Development*** (Arts. 3 and 4 in particular). Under these instruments, States that lack the means or are unable to fulfill their human rights commitments to their citizens can rely on the support of other States, given that all States are required, individually and collectively, to fulfill these rights, including the right to education.

When it comes to the right to education, this support should not be limited to financial matters, but should encompass all types of cooperation: exchanges of experience, cultural exchanges, training for teachers and students, etc.

The international organizations and United Nations agencies must, depending on the area of their work and activity, provide contributions for the implementation of the right to education.

B. Pertinent Norms

1. At the International Level

It is not necessary to mention all the international norms referring to education. We will therefore confine ourselves (in addition to those already cited) to the most important ones covering the various aspects of the right to education and the various categories of persons: the ***Convention Relating to the Status of Refugees*** (Art. 22); the ***Convention on the Elimination of All Forms of Discrimination against Women*** (Arts. 10, 14.d); the ***Convention on the Rights of the Child*** (Arts. 14, 18, 28, 29, 30); the ***Convention on the Rights of Persons with Disabilities*** (Art. 24); the ***UNESCO Convention on Technical and Vocational Education*** (Arts. 2.3, 6.a, d & e);[692] the

[692] Adopted on 10 November 1989, entered into force 29 August 1991; ratified to date by 19 States: https://www.unesco.org/en/legal-affairs/convention-technical-and-

Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (Arts. 2.1, 4.2, 4.3);[693] the ***Declaration on Social Progress and Development*** (Art. 10.e);[694] the ***UNESCO Recommendation on Development and Adult Education*** (Art. 4.a).[695]

The ***United Nations Declaration on the Rights of Indigenous Peoples*** recognizes the right of indigenous peoples to self-determination. By virtue of this right, they "freely determine their political status and freely pursue their economic, social and cultural development" (Art. 3). They also "have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions" (Art. 4). The Declaration provides that "States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language" (Art. 14.3).

Article 25 of the ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** enshrines the right (of children) to education and the right (of adults) to training, as well as the right of rural women "to receive all types of training and education, whether formal or non-formal" (Art. 4.2.d).

The ***UNESCO Recommendation concerning the Status of Teachers***[696] deals with teachers' training, their continuing education, advancement and promotion in employment and career, salaries and social security. It further deals with the rights and duties of

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vocational-education

693 General Assembly Resolution 47/135, 18 December 1992.

694 General Assembly Resolution 2542 (XXIV), proclaimed on 11 December 1969.

695 Adopted on 26 November 1976.

696 Adopted on 5 October 1966.

educators, their professional freedom and conditions favorable to teaching effectively.

ILO Convention No. 140 on paid educational leave[697] provides for paid leave "for the purpose of training at any level; general, social and civic education; trade union education" (Art. 2). ***ILO Convention No. 142 on human resources development***[698] requests that States "adopt and develop comprehensive and coordinated policies and programmes of vocational guidance and vocational training, closely linked with employment, in particular through public employment services" (Art. 1). The ***ILO Employment Service Convention No. 88***[699] requires employment services to help the unemployed "to obtain vocational guidance or vocational training or retraining" (Art. 6.a.i).

The ***World Conference on Human Rights*** in Vienna[700] reaffirmed that:

> *States are duty-bound… to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms. The World Conference on Human Rights emphasizes the importance of incorporating the subject of human rights education programmes and calls upon States to do so […] Human rights education should include peace, democracy, development and social justice, as set forth in international and regional human rights instruments, in order to*

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697 Adopted on 24 June 1974; entered into force 23 September 1976; ratified to date by 35 States: https://www.ilo.org/dyn/normlex/fr/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312285

698 Adopted on 23 June 1975; entered into force 19 July 1977; ratified to date by 68 States: https://www.ilo.org/dyn/normlex/fr/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312287

699 Adopted on 9 July 1948; entered into force 10 August 1950; ratified to date by 92 States: https://www.ilo.org/dyn/normlex/fr/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312233

700 Held in Vienna, from 14 to 25 June 1993.

achieve common understanding and awareness with a view to strengthening universal commitment to human rights.[701]

2. At the Regional Level

In the first ***Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*** (Paris, 20 March 1952)[702] "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." (Art. 2)

Under the ***European Social Charter***, States parties commit themselves "to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools." (Art. 17.2) They further agree "to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private." (Art. 15.1)

The ***European Charter for Regional or Minority Languages*** (1992)[703] provides for, inter alia, teaching in these languages at all educational levels (preschool, primary, secondary, university, technical and professional). (Art. 8)

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701 The Vienna Declaration and Program of Action, Part I, § 33; Part II, § 80, respectively, https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action

702 https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=009

703 https://www.coe.int/en/web/european-charter-regional-or-minority-languages/text-of-the-charter

By adopting the ***Framework Convention for the Protection of National Minorities*** (1995),[704] the European States undertook to, inter alia, "recognize that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing", to learn that language and to set up and to manage private educational and training establishments. They also committed themselves to take measures to, inter alia, provide adequate opportunities for teacher training and access to textbooks and "foster knowledge of the culture, history, language and religion of their national minorities and of the majority." (Articles 10 to 14)

Article 17 of the ***African Charter on Human and People's Rights*** (1981) stipulates: "1. Every individual shall have the right to education. 2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

The ***African Charter on the Rights and Welfare of the Child*** (1990) recognizes the right of every child to education (Art. 11) and requires that States parties, "in accordance with their means and national conditions take all appropriate measures: (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing; (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and (c) to ensure that the children of working parents are provided with care services and facilities" (Art. 20).

The ***Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*** (2003) requires that States

[704] https://rm.coe.int/168007cdac

parties "take all appropriate measures to: eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training" (Art. 12.1.a).

Several articles of the ***Charter of the Organization of American States***[705] are devoted to the right to education and to education in general. "The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases: a) elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge; b) middle-level education shall be extended progressively to as much of the population as possible, with a view to social improvement. It shall be diversified in such a way that it meets the development needs of each country without prejudice to providing a general education; and c) higher education shall be available to all, provided that, in order to maintain its high level, the corresponding regulatory or academic standards are met" (Art. 49). Further, "the Member States will give special attention to the eradication of illiteracy, will strengthen adult and vocational education systems, and will ensure that the benefits of culture will be available to the entire population. They will promote the use of all information media to fulfill these aims" (Art. 50). Furthermore, according to this Charter, "the education of peoples should be directed toward justice, freedom, and peace" (Art. 3.n). Finally: "Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress." (Art. 47)

States parties to the ***American Convention on Human Rights*** (1969) "undertake to adopt measures, both internally and through

[705] www.oas.org/juridico/fran%C3%A7ais/charte.html#Chapitre%20XXI

international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires" (Art. 26).

Article 13 of the ***Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights*** (1988) reprises almost word for word Article 13 of the ICESCR (see above) devoted to the right to education.

C. States' Specific Obligations regarding Education

As already discussed, the right to education is a human right recognized in many international, regional and national instruments. In this regard, it imposes obligations upon States. Like other human rights, the right to education demands that States respect it, protect it and fulfill it. It further "incorporates both an obligation to facilitate and an obligation to provide.[706]

"The obligation to ***respect*** requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to ***protect*** requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfill (***facilitate***) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfill (***provide***) the right to education. As a general rule, States parties are obliged to fulfill (provide) a specific right in the ICESCR when an individual or group

[706] CESCR, General Comment No. 13, § 46.

is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal."[707]

The ICESCR is unequivocal about the right to education, whose enjoyment States must assure free of charge at all levels (immediately at the primary level and progressively for the rest). Thus, the CESCR has affirmed that "there is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant".[708]

Moreover, the Committee has emphasized the obligation of every State party "to take steps, 'individually and through international assistance and cooperation, especially economic and technical', towards the full realization of the rights recognized in the Covenant, such as the right to education".[709]

The Committee also emphasizes: "In relation to the negotiation and ratification of international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to education. Similarly, States parties have an obligation to ensure that their actions as members of international organizations, including international financial institutions, take due account of the right to education."[710]

Failure by States to Comply with their Obligations regarding the Right to Education

According to the CESCR, non-compliance with Article 13 of the ICESCR can include, for example:[711]

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707 Ibid., § 47.
708 Ibid., § 45.
709 Ibid., § 56.
710 Ibid.
711 Ibid., § 59.

- adopting or not repealing legislation that creates discrimination in education against individuals or groups, based on any motives specifically prohibited;
- failure to adopt measures to counter in practice discrimination in schooling;
- the implementation of school curricula that do not correspond to the educational objectives stipulated in Article 13.1;
- the absence of a transparent and effective oversight system regarding the implementation of Article 13.1;
- not setting as a priority compulsory primary schooling, accessible to all free of charge;
- failing to take deliberate and effective measures aiming for the progressive fulfillment of the right to secondary, higher and fundamental education in conformity with Article 13.2.b and 13.2.d;
- prohibiting private schools;
- failing to ensure that private schools respect the minimal education norms required under Article 13.3 and 13.4;
- the denial of academic freedom to personnel and students;
- the closing of educational institutions during times of political turmoil, in violation of Article 4.

D. Examples of Implementation

1. At the National Level

The vast majority of States have ratified many international conventions dealing with the right to education, such as the Convention on the Rights of the Child, which is virtually universal (the exception being the United States, which has signed but not ratified it). Most of them have also incorporated the provisions of these conventions into national legislation.

2. At the Regional Level

In its 15 December 2017 decision, the ***African Committee of Experts on the Rights and Welfare of the Child*** noted that ***Mauritania*** had not implemented at all institutional levels its legislation criminalizing slavery, and noted as well the violation of the right to education (Art. 11 of the African Charter on the Rights and Welfare of the Child) of two brothers who had been slaves for 11 years.[712]

In a complaint to the ***European Committee of Social Rights*** against ***France***, the association Autisme-Europe reproached France for not satisfactorily fulfilling "its obligations under Articles 15§1 and 17§1 of Part II of the Revised European Social Charter because children and adults with autism do not and are not likely to effectively exercise, in sufficient numbers and to an adequate standard, their right to education in mainstream schooling or through adequately supported placements in specialised institutions that offer education and related services." Further, France was accused of being "in violation of the non-discrimination principle embodied in Article E of Part V of the Revised European Social Charter since persons with autism do not benefit from the right to education recognized to persons with disabilities by Article 15§1 and generally set out in Article 17§1 of Part II of the Charter." The Committee's 4 November 2003 ruling found in favor of the plaintiff and declared that the situation in France "constitutes a violation of Articles 15§1 and 17§1 whether alone or read in combination with Article E of the revised European Social Charter."[713] In its follow-up

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712 Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v. The Government of the Republic of Mauritania, https://www.acerwc.africa/en/communications/minority-rights-group-international-and-sos-esclaves-behalf-said-ould-salem-and-yarg

713 Complaint n°13/2002, https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-13-2002-international-association-

report, the Committee noted that France had still not brought the situation into line with the Charter.[714]

Following a complaint by Norwegian parents who do not profess the Christian religion and requested the total exemption of public primary school students from religious instruction in Christianity, religion and philosophy, the ***European Court of Human Rights*** concluded that there was a violation of Article 2 of Protocol No. 1 (right to education) as interpreted in the light of Articles 8 (right to respect of private and family life) and 9 (freedom of thought, of conscience and of religion) under the European Convention for the Protection of Human Rights and Fundamental Freedoms, arguing that the State (***Norway***) had failed to take "sufficient care that information and knowledge included in the curriculum be conveyed in an objective, critical and pluralistic manner".[715]

In 1997, a request for birth certificates for Dilcia Yean (10 years old) and Violeta Bosico (12 years old) was refused by the Registry Office of the ***Dominican Republic***. Yet the two girls, of Haitian descent, were born in the Dominican Republic. Without birth certificates, they were deprived of their right to nationality and consequently of their civil, political, economic and social rights. They were expelled from school on the grounds that only children with Dominican birth certificates could attend public schools. In its judgment in September 2005, the ***Inter-American Court of Human Rights*** concluded that the Dominican Republic, to the detriment of the two children, had violated the rights enshrined in Articles 3 (right to legal recognition of the person); 18 (right to a name); 20

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autism-europe-iaae-v-france

714 Follow-up to decisions on the merits of collective complaints, 2018, https://rm.coe.int/findings-2018-on-collective-complaints/168091f0c7

715 *Folgerø and others v. Norway*, no 15472/02, judgment of 29 June 2007, § 102, http://hudoc.echr.coe.int/fre#{%22languageisocode%22:[%22ENG%22],%22appno%22:[%2215472/02%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22],%22itemid%22:[%22001-81356%22]}

(right to nationality); and 24 (equality before the law) of the American Convention on Human Rights, relative to Article 19 (rights of the child) as well as relative to Article 1.1 (obligation to respect rights) of the Convention.[716] In its 12 March 2019 monitoring report on judgments, the Court noted that the judgment had been only partially executed. Although the Dominican Republic had paid US$ 8,000 in compensation to each plaintiff and had provided them in 2001 with birth certificates, two measures had still not been taken, i.e. satisfaction and the guarantee of non-repetition. Moreover, the Dominican Republic had failed to meet its obligation to inform the Court by omitting to present several reports on compliance, without any explanation. The Court again asked the State to make public acknowledgment of its international responsibility and apologize to the victims (by way of satisfaction and guarantee of non-repetition) as well as to adopt in its domestic law the necessary measures to regulate the procedure and conditions of acquisition of Dominican nationality by means of a belated birth certificate.[717]

3. At the International Level

In its concluding observations regarding ***Angola*** (2008),[718] the ***CESCR*** noted inter alia: the high level of illiteracy among those over 15 years of age; the limited access to education in their mother tongue by the children of poor families, girls, children with disabilities, children victims of landmines and children from urban and remote rural areas, as well as the high dropout rate. The Committee deplored that "the budget allocated to the education decreased between 2004 and 2006, despite the rapidly rising number of children in the school age. It is also concerned at the lack of schools and training of teachers, especially in remote areas and in slum settlements." In view of these elements, the Committee

716 Case *Dilcia Yean and Violeta Bosica v. Dominican Republic*

717 Report of the Court, 12 March 2019, p.12, § 23; p.27, § 7: https://www.corteidh.or.cr/docs/supervisiones/yean_12_03_19.pdf [Spanish only]

718 E/C.12/AGO/CO/3, 1 December 2008, §§ 38, 39.

recommended that the State party (Angola): "a) adopt a comprehensive plan of action concerning the educational system; (b) ensure the availability of teachers in remote rural areas, and that they are fully trained and qualified; and (c) increase public expenditure on education in general, and take deliberate and targeted measures towards the progressive realization of the right to education for the disadvantaged and marginalized groups throughout the country."

Following its consideration of the periodic report of Angola in 2016, the Committee reiterated its concerns regarding the low levels of schooling, the high dropout rate (in particular among girls in primary school) and the difficulty of access to education in rural areas. It asked the State to "develop specific strategies to address the high dropout rates, especially of girls", to "increase significantly its investments in the education sector, [and to] improve the quality of education and expand investment in teacher training."[719]

Concerning the right to education of a boy of Moroccan nationality born and raised in Melilla (***Spain***), the ***Committee on the Rights of the Child*** noted that the children living in Melilla who are in an irregular administrative situation are confronted in practice by obstacles that prevent them from going to school. Considering that the "the right to education should be guaranteed to all children of compulsory school age, regardless of their nationality or administrative status", the Committee noted the violation of Article 28 of the Convention on the Rights of the Child. Accordingly, the Committee requested Spain to ensure an "effective reparation for the violations suffered, which includes adequate compensation as well as taking proactive steps to help him to catch up at school and reach the same level as his peers as soon as possible." It further asked Spain to "prevent similar violations in the future."[720]

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719 E/C.12/AGO/CO/4-5, 15 July 2016, §§ 53, 54.

720 CRC/C/87/D/115/2020, 22 June 2021, §§ 12.4, 12.7, 13.

In its concluding observations regarding ***Argentina***, the ***Committee on the Elimination of Racial Discrimination*** (CERD) had already in 2004 deplored the non-respect of the right to bilingual and intercultural education, recognized for indigenous peoples by the Constitution, and the insufficient measures taken to preserve the indigenous languages and include their history and culture in the school curricula.[721] Twelve years on (2017), the CERD noted an absence of progress in this area and recommended that Argentina "step up its efforts to ensure the availability, accessibility and quality of education at all levels for indigenous children, including in their mother tongue" and "continue its efforts to increase the number of teachers from indigenous communities, including by facilitating their access to training courses."[722]

Teaching for Profit (or the Commercialization of Education) and Its Impacts on the Right to Education

As in other public service sectors, neoliberal policies promoted by the international financial and business institutions have been transforming education into a commodity. For several decades, the World Bank has been forcing countries in the South "to initiate significant cuts under structural adjustments to their public services, including education".[723] The World Trade Organization agreements (GATS[724] and TRIPS[725]) constitute the spearhead of this process. They are backed up by the efforts of intergovernmental organizations such as the European Commission and the OECD, which for decades have been promoting the exclusive

[721] CERD/C/65/CO/1, 10 December 2004, § 19.

[722] CERD/C/ARG/CO/21-23, 11 January 2017, §§ 27, 28.

[723] Annual Report of the Special Rapporteur on the Right to Education, A/HRC/29/30, 10 June 2015, § 37.

[724] WTO, GATS: *General Agreement on Trade in Services*, https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm

[725] WTO, TRIPS: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

consideration of the needs of companies and employers and the financing of studies by students in the case of higher education.[726]

The convergence of these processes has today resulted in the privatization of universities almost everywhere in the world or targeted financing of university research programs by business enterprises – in their own interest, of course. This has reached such a point that "in many countries, private higher education institutions 'represent the clear majority'."[727] Simultaneously, public schools are more and more infiltrated by transnational corporations, such as the Paris Institut Polytechnique (one of France's the most prestigious higher education institutions), where not only do Total executives teach, but that company recently signed a €3.8 million contract to fund a research chair at the school.[728] Likewise, in 2007, Nestlé concluded an agreement with the Lausanne Polytechnic University (Switzerland) to finance two chairs, in the amount of five million Swiss francs, for research "on the relation between nutrition and the brain."[729]

While higher education remains the preferred target of privatization, other levels are not spared. For example, "92 per cent of education in **Haiti** had been taken over by the private sector."[730] Education is more and more tending to the pursuit of profit with its objectives dictated by private and business interests, making the student "a consumer and education [...] a consumer good."[731]

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726 CETRI, *L'Offensive des marchés sur l'université*, Alternatives Sud, Vol. X (2003) 3.

727 Report of the Special Rapporteur on the Right to Education, A/69/402, 24 September 2014, § 37.

728 See Léa Dang's article, 13 October 2020 at Socialter, https://www.socialter.fr/article/les-grandes-ecoles-a-la-botte-des-multinationales

729 Our translation. Available at: https://www.rts.ch/info/sciences-tech/1123730-nestle-et-epfl-une-collaboration-a-25-millions.html

730 Report of the Special Rapporteur on the Right to Education, A/69/402, 24 September 2014, § 55.

Thus, the education business seems to be booming and highly lucrative, as illustrated by the turnover of the top 20 multinational education companies, which total US$ 36 billion.[732] As for student financing, while annual tuition fees, which vary from country to country, have become the norm, scholarship systems have often been transformed into loan systems. The same can be said of the proliferation of the voucher system (see below) and competition among educational institutions, which only serve to increase inequalities in education.

Although free primary education (and the gradual introduction of free education at all other levels) is enshrined in all international human rights instruments, elementary school fees remain an obstacle to children's schooling. Indeed, even when there are no official school fees for primary education, in many countries parents are required to pay various costs (maintenance of school buildings, financial contributions for the school or teachers, etc.). In this respect, we also need to take into account the "ancillary" expenses borne by parents (books, uniforms, meals, transport, etc.), which are never calculated in national budgets and are all obstacles to children's schooling.[733]

These privatization policies are diametrically opposed to the spirit and letter of international human rights treaties, even though they have been ratified by the overwhelming majority of States.

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731 Ian Macpherson, Susan Robertson and Geoffrey Walford, (eds), *Education, Privatization and Social Justice: Case Studies from Africa, South Asia and South East Asia* (Oxford: Symposium Books Limited, 2014), cited by the Special Rapporteur on the Right to Education in his annual report, A/HRC/29/30, 10 June 2015, § 36.

732 Report of the Special Rapporteur on the Right to Education, A/69/402, 24 September 2014, § 33.

733 See, inter alia, the annual reports of the Special Rapporteur on the Right to Education, especially E/CN.4/1999/49 and E/CN.4/2004/45.

Vouchers

Under the voucher system, some governments allow individuals to contribute funds to the school of their choice, or pay money directly to the chosen school. The amount of the payments in general corresponds to the tuition fees. The rationale behind this is to broaden the choice of the consumers (the parents) and promote competition among schools. Another rationale, albeit implicit, is the desire to push public schools into the competitive arena, for they are seen as having a quasi-monopoly on education. The distinction between public and private schools, State-supported or not, free or not, and the diversity that results, risks disappearing if the proposals pushing the voucher system gain traction. In this case, only the schools that can attract students can obtain financing. The principle on which the voucher system is founded limits the role of the State to granting funds to students or educational institutions, to the detriment of the State's other human rights obligations, which include guaranteeing the means of education and the concomitant accessibility, acceptability and adaptability of education.

"The experience of **Chile** demonstrates the negative consequences of a voucher system in creating social stratification."[734] Similar practices have been observed in the Philippines and in Pakistan.[735] According to the Special Rapporteur on the Right to Education, "the pursuit of private interests and the commercialization of education should have no place in the education system of a country or in any future education agenda."[736] He proposes that States "should abolish

[734] Report of the Special Rapporteur on the Right to Education, A/70/342, 26 August 2015, § 50.

[735] Ibid.

[736] Ibid., § 123.

voucher systems which support private providers at the cost of public education systems."[737]

The Awakening of Certain States

The Special Rapporteur on the Right to Education sees privatization as not only "detrimental to education as a public good"[738] but harmful to "the principle of social justice."[739] Thus, according to the Rapporteur, it is "imperative to stop society from being tipped irrevocably into a world that caters only to the needs of the privileged few."[740]

In recent years, several States have reconsidered their position.

Noting that the "exorbitant fees charged by private providers of education are increasing social and economic disparity between working and middle classes", the Supreme Court of ***Nepal*** ordered the education authorities to "devise reform programmes to control private schools — regulating fees, prohibiting the sale of unregistered and overpriced textbooks and limiting the number of private schools obtaining accreditation."[741]

The law on education of the ***Bahamas*** asserts that schools "shall not be established or maintained for the private profit of any person or persons."[742]

In ***China*** the law on education stipulates that "educational activities must conform with the public interest of the State and

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737 Ibid., § 51.

738 Report of the Special Rapporteur on the Right to Education, A/70/342, 26 August 2015, § 1.

739 Report of the Special Rapporteur on the Right to Education, A/HRC/29/30, 10 June 2015, § 60.

740 Report of the Special Rapporteur on the Right to Education, A/69/402, 24 September 2014, § 73.

741 Ibid. § 91.

742 Report of the Special Rapporteur on the Right to Education, A/HRC/29/30, 10 June 2015, § 78.

society" and that "no organization or individual may operate a school or any other type of educational institution for profit."[743]

In a 1997 ruling, the Constitutional Court of ***Colombia*** opined that the exclusion of students "on an economic basis" was a violation of the right to education.[744]

Sweden has paid the price for having privatized its education system and is now considering removing the profit motive from its legislation. *"The Swedish free school experiment shows that allowing for-profit providers into the school market has not led to increased performance and improved schools, but instead permitted another vested interest into education."*[745]

In its ruling of 25 March 1993, the ***European Court of Human Rights*** noted that the State cannot "absolve itself from responsibility by delegating its obligations to private bodies or individuals."[746]

The Special Rapporteur on the Right to Education insists that the State "remains primarily responsible for education on account of international legal obligations and cannot divest itself of its core public service functions."[747] Hence the proposal that governments devote "between 15 and 20 per cent of national budgets, or between 4 and 6 per cent of gross domestic product (GDP), to education."[748]

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743 Ibid.

744 Cited in the report by the Special Rapporteur on the Right to Education to the General Assembly, A/69/402, § 93.

745 Report of the Special Rapporteur on the Right to Education, A/HRC/29/30, § 74.

746 *Costello-Roberts v. United Kingdom*, 25 March 1993, § 27, http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57804%22]}

747 Report of the Special Rapporteur on the Right to Education, A/HRC/29/30, § 54.

748 Report of the Special Rapporteur on the Right to Education, A/70/342, § 48.

CHAPTER 8

CULTURAL RIGHTS

Cultural rights are an integral part of the corpus of human rights in many areas of life (not only artistic, literary or traditional but also political, social, economic, technological, spiritual, etc.). Thus, these rights exemplify par excellence the universality, indivisibility and interdependence of human rights. The right to education, to information, to freedom of opinion and expression, to free assembly, to participation in decision-making processes, are indispensable to the enjoyment of cultural rights.

At the national level, centralized States have difficulty "understanding" and implementing cultural rights, often warning about the danger to their "unity" and "national identity". Thus, the majority or the minority in power (depending on the country) tends to discriminate against and exclude the other components of the nation, or even to seek to eliminate (through assimilation policies) all cultural differences, in particular ethnic and religious ones. Such discrimination and violations of human rights can sometimes even be the cause of civil wars.

At the international level, some powerful States have long practiced what one could call a variation on the theme of colonialism, not only in economic and political spheres but also in cultural matters, the one being impossible without the other. For example, a State such as the USA demands and obtains from South Korea (as part of a bilateral trade agreement) a reduction in the number of days on which cinemas are obliged to show South Korean

films, from 146 days to 73 per year, so that they can show more American films.[749]

The commodification of many areas of life (not just education and public services, but also artistic, literary and scientific productions) is a major obstacle to the enjoyment of cultural rights, since a third of humanity - battling simply to survive - is excluded, and for almost another third, access to cultural productions is a luxury.

A. Definition and Content of Cultural Rights

It is obvious from the numerous definitions that can be given to "culture" that this notion covers multiple elements and facets. ***UNESCO's Universal Declaration on Cultural Diversity,*** of 2 November 2001, defines culture as

> *the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.*[750]

For the ***CESCR***

> *culture encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their*

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749 In this regard, see Alejandro Teitelbaum (ed.), *International, Regional, Subregional and Bilateral Free Trade Agreements* (Geneva: CETIM, 2010), p. 11: International, Regional, Subregional and Bilateral Free Trade Agreements | (cetim.ch).

750 Preamble, §5. This definition is taken, in turn, from § 6 of the preamble of the Final Report adopted following UNESCO's World Conference on Cultural Policies, Mexico City, 26 July to 6 August 1982.

> *world view representing their encounter with the external forces affecting their lives.*[751]

The Committee further emphasizes its vital and evolving dimension.

> *The concept of culture must be seen not as a series of isolated manifestations or hermetic compartments, but as an interactive process whereby individuals and communities, while preserving their specificities and purposes, give expression to the culture of humanity.*[752]

A sociological definition would posit that culture is *"the sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups. Thus understood, culture is also seen as a coherent self-contained system of values and symbols as well as a set of practices that a specific cultural group reproduces over time and which provides individuals with the required signposts and meanings for behavior and social relationships in everyday life."*[753] Thus, according to this definition, culture can be perceived as a product, a process and a way of life.[754]

Defined as "rights in the field of culture",[755] cultural rights encompass a panoply of rights enshrined in several international norms. While the United Nations human rights instruments play a

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751 CESCR, General Comment No. 21, Right of everyone to take part in cultural life, E/C.12/GC/21, 21 December 2009, § 13.

752 Ibid., § 12.

753 Rodolfo Stavenhagen, "Les droits culturels? Le point de vue des sciences sociales" in H. Niec (ed.), Pour ou contre les droits culturels: Recueil d'articles pour commémorer le cinquantième anniversaire de la Déclaration universelle des droits de l'homme (Paris & Leicester: UNESCO & the Institute of Art and Law, 2000).

754 Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council, A/HRC/14/36, 22 March 2010, § 5. See also International Commission of Jurists, submission to the CESCR, day of general discussion on the right to take part in cultural life, E/C.12/40/7, § 6.

755 Report of the Special Rapporteur previously cited, A/HRC/14/36, §5.

central role, UNESCO has also contributed to defining cultural rights through several international conventions.

1. The United Nations

All the international human rights treaties enshrine cultural rights, in at least some of their aspects, beginning with the ***Universal Declaration of Human Rights***, which states in Article 27:

> *1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
> *2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

Article 15 of the ***ICESCR*** – the foundational text enshrining cultural rights as human rights – comprises the various components of cultural rights. These are expressed in terms similar to the Universal Declaration and subdivided into **three** distinct but interdependent rights: 1. the right to participate in cultural life (Art. 15.1.a); 2. the right to benefit from scientific progress and its practical applications (Art. 15.1.b); 3. the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art. 15.1.c).

a. The Right to Participate in Cultural Rights

According to the CESCR, there are three main interdependent components to the right to participate in cultural life:

> *a) Participation covers in particular the right of everyone – alone, or in association with others or as a community – to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one's own cultural practices and to express oneself in the*

language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity.
b) Access covers in particular the right of everyone – alone, in association with others or as a community – to know and understand his or her own culture and that of others through education and information, and to receive quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities.
c) Contribution to cultural life refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.[756]

Regarding one's contribution to cultural life, ***procedural*** rights are paramount: basic, material rights can be exercised only if specific procedures and mechanisms exist allowing the groups and individuals concerned to participate effectively in decision-making processes that affect their way of life.[757] In this regard, the Committee

[756] CESCR, General Comment No. 21, § 15.

[757] Laura Pineschi, "Cultural Diversity as a Human Right? General Comment No. 21 of the CESCR" in Silvia Borelli & Federico Lenzerini (eds), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Leiden 2012), p. 44.

provides for consulting "individuals" and the "concerned communities" to protect cultural diversity.[758].

The right to participate in decision-making that influences cultural rights is fundamental and is at the heart of the debate on cultural rights.

In the view of the ***United Nations Special Rapporteur in the Field of Cultural Rights***,[759] the *right of every person to rest and leisure*, provided for in Article 24 of the Universal Declaration of Human Rights, is closely linked to cultural rights. The Special Rapporteur considers it important that everyone dispose of time "to participate in cultural life" and that leisure and culture be closely linked, while noting that culture, which touches all aspects of life, "cannot be limited to specific activities and should not be restricted to the concept of rest and leisure."[760]

b. The Right to Benefit from Scientific Progress and Its Applications

There is a tendency to consider the right to science as independent of the right to participate in cultural life, to which it is nonetheless linked in international instruments. According to the Special Rapporteur on Culture, the two are intrinsically linked and have many points in common in that they deal with the search for knowledge and understanding of the world and of human creativity in a constantly changing environment.[761]

Further, one of the requirements for the implementation of these rights is ensuring for everyone the conditions necessary to pursue a

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[758] Ibid., p. 45.

[759] Farida Shaheed (2009-2015), Karima Bennoune (2015-2021) and Alexandra Xanthaki (since 2021).

[760] Report of the Special Rapporteur in the Field of Cultural Rights, A/HRC/14/36, § 18.

[761] Report of the Special Rapporteur in the field of cultural rights, A/HRC/20/26, 14 May 2012, §§ 3, 7.

critical approach to the individual and to the world in which the individual lives, as well as to be able to inquire, question and explore new knowledge, through ideas, various forms of expression and concrete applications.

Moreover, given the enormous effect of scientific and technological progress on the daily life of individuals and peoples, the right to science must also be understood in relation to freedom of expression, the right of all to participate in public affairs, directly or through freely chosen representatives, and the right of peoples to self-determination.[762] The right to development should also be taken into account, as it entails "the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom."[763]

The normative content of the right to benefit from scientific progress and its applications includes (i) access by everyone without discrimination to the benefits of science; (ii) opportunities provided to everyone to contribute to science and the indispensable freedom to pursue scientific research; (iii) participation of individuals and communities in the decision-making process; and (iv) an environment encouraging the conservation, development and diffusion of science and technology.[764]

c) The Freedom Indispensable for Scientific Research and Opportunities to Contribute to Science

The freedom to pursue scientific research involves ensuring that science is exempt from political and economic interference, while guaranteeing the highest level of ethics in the scientific professions.

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762 Ibid., § 21.

763 Declaration on the Right to Development, adopted by the General Assembly 4 December 1986, Art. 2.3.

764 Report of the Special Rapporteur in the field of cultural rights, A/HRC/20/26, 14 May 2012, § 25.

Considered in relation to the right to freedom of association, expression and information, scientific freedom includes the right to communicate freely the results of one's research to others and to publish and disseminate them without geographical limits. The right of scientists to create and participate in professional associations as well as to collaborate with their peers, in other countries or in their own, must also be respected and protected.[765]

The ***Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications***[766] emphasizes that freedom to pursue research is vital for advancing knowledge on any specific subject, providing data and testing hypotheses for practical needs, as well as promoting scientific and cultural activity in general.

That said, scientific research should have a social function and be guided above all by the general interest, bearing in mind that scientific progress does not necessarily benefit humanity (e.g. the development of nuclear, chemical and germ warfare weapons) or can be highly problematic (e.g. laboratory manipulation of living organisms). In view of this, the orientation, the ends and the financing of scientific research must be subject to constant open and informed debate.

d) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author

Known as intellectual property, this right "is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15.1.c [of the ICESCR], and other human rights from most legal entitlements recognized in intellectual property systems. […] It is therefore important not to equate

765 CESCR, General Comment No. 13, E/C.12/1999/10, §§ 38 – 40.

766 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, adopted by the UNESCO expert conference in Venice, 16-17 July 2009.

intellectual property rights with the human right recognized in article 15.1.c."[767]

The intention of those who drafted this provision was to "proclaim the intrinsically personal character of every creation of the human mind and the ensuing durable link between creators and their creations".[768] The "moral interests" referred to in Article 15.1.c of the Covenant "include the right of authors to be recognized as the creators of their scientific, literary and artistic productions and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such productions, which would be prejudicial to their honor and reputation. The Committee stresses the importance of recognizing the value of scientific, literary and artistic productions as expressions of the personality of their creator".[769]

Regarding "material interests" of authors, their protection under Article 15.1.c of the Covenant "reflects the close linkage of this provision with the right to own property"[770] as recognized in Article 17 of the Universal Declaration. Further, unlike other human rights, the author's material interests are not directly linked to the author's personality but contribute to the exercise of the right to a decent standard of living (Art. 11.1 of the Universal Declaration). In today's world, this aspect is often overlooked, and transnational corporations abusively invoke this article to defend their patents in perpetuity by means of legal and scientific technical maneuvers (see below).

e) The Conflict between Human Rights and Intellectual Property

For many years, in particular since the adoption by the World Trade Organization (WTO) of the Agreement on Trade-Related

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767 CESCR, General Comment No. 17, E/C.12/GC/17, §§ 1, 3.
768 Ibid., § 12.
769 Ibid., §§ 13, 14.
770 Ibid., § 15.

Aspects of Intellectual Property Rights (TRIPS),[771] there has been a conflict raging between human rights and intellectual property rights.[772]

With particular regard to the right to pursue scientific research, the ***Venice Statement*** summarizes the conflict as follows.

> *The right to enjoy the benefits of scientific progress and its applications may create tensions with the intellectual property regime, which is a temporary monopoly with a valuable social function that should be managed in accordance with a common responsibility to prevent the unacceptable prioritization of profit for some over benefit for all.*[773]

This prioritization of profit for some over benefit for all was already deplored by the CESCR in 2001.

> *Whereas human rights are dedicated to assuring satisfactory standards of human welfare and well-being, intellectual property regimes, although they traditionally provide protection to individual authors and creators, are increasingly focused on protecting business and corporate interests and investments.*[774]

Intellectual property regimes have demonstrated that they have the ability to impede optimal development and the greatest possible access to new technological solutions to essential human problems such as safe food and water, health, chemical safety, energy and climate disruption.

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771 Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex 1C: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm

772 Former Sub-Commission on the Promotion and Protection of Human Rights, Resolution E/CN.4/SUB.2/RES/2000/7, 17 August 2000, § 2. See also the reports of the Special Rapporteur on the Right to Health, A/HRC/11/12 and A/HRC/17/43, § 7.

773 Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications, adopted by the UNESCO expert conference in Venice, 16-17 July 2009, § 10, https://unesdoc.unesco.org/ark:/48223/pf0000185558

774 Human rights and intellectual property, Statement by the CESCR, E/C.12/2001/15, 14 December 2001, § 6.

It is in the area of health that the conflict between human rights and intellectual property has been most pronounced.[775] However, it is just as pertinent – if not more so – regarding the right to pursue scientific research since, as mentioned above, this implies that States ensure that the benefits of science (of which medicines are but one example) are physically available and economically affordable without discrimination. Yet the intellectual property rights regimes currently in force have precisely the effect of impeding access to scientific results, innovations and applications, which should be as broad as possible.

As the World Intellectual Property Organization (WIPO) puts it, somewhat disingenuously: "in order for the international patent system to continue to serve its fundamental purpose of encouraging innovation and promoting dissemination and transfer of technology, the right balance should be struck between the rights of technology holders and the rights of technology users for the benefit of society as a whole."[776]

Obviously, this "right balance" advocated by the WIPO cannot be achieved. On the contrary, transnational corporations – for the most part pharmaceutical and agrochemical – benefit from the commodification of scientific progress, which is contrary to human rights and in particular to the right to science, and almost always detrimental to the holders of these rights. This inordinate profiteering, achieved through the patent system, is further

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[775] Right up to the present, the current international intellectual property regime has effectively allowed transnational pharmaceutical companies to make almost unlimited profits from the protection conferred by patents on medicines, often to the detriment of the right to health of the most vulnerable – those with the greatest need of medicines but without the means to obtain them, precisely because the prices are kept high owing to protection from the intellectual property rights regime. See also the chapter on the right to health. Regarding seeds, see *La propriété intellectuelle contre la biodiversité?* (Geneva: CETIM, 2011).

[776] Cited in the Report of the Special Rapporteur, A/HRC/20/26, § 58.

amplified by various *evergreening*[777] techniques and by biopiracy[778] practiced by transnational corporations with the support of certain States. In this regard, the former director of the *Traditional Knowledge Digital Library* (a data bank of Indian cultural heritage) listed between 1,500 and 2,000 cases of biopiracy. After examining 200 cases, the *Council of Scientific and Industrial Research of India* canceled 180 patents.[779]

In one of the Special Rapporteur's reports, there is an analysis of the effect of commercial patents on cultural rights. Disturbed by the orientation of research "away from matters of greatest public concern", the Special Rapporteur notes that "the fruits of publicly funded scientific research are often transferred to exclusive private ownership. Of equal concern is the change in the culture surrounding university research, away from an activity conducted for the public good and human advancement towards an activity valued only for its potential commercial application."[780]

The Special Rapporteur reckons that "innovations essential for a life with dignity should be accessible to everyone, in particular marginalized populations. From a human rights perspective, mechanisms are needed to protect the public interest wherever a particular technology is critical to human welfare."[781] She reminds States of their human rights obligation "not to support, adopt or accept intellectual property rules, such as TRIPS-Plus provisions,

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777 "Evergreening" is the term for the various techniques used by patent holders, especially pharmaceutical companies, to extend patent protection. The most common of these consists of repeatedly modifying several genes or molecules in the products so as to be able to file for – and obtain – new patents for what are essentially the same medicines, based on the same active ingredient.

778 See note 434.

779 See https://www.deccanherald.com/content/490282/india-blocks-colgate-patents-spices.html

780 Report of the Special Rapporteur to the 72nd session of the General Assembly, A/70/279, 4 August 2015, §§ 56, 58.

781 Ibid., § 49.

that would impede them from using exclusions, exceptions and flexibilities and thus from reconciling patent protection with human rights."[782] She also calls for national courts and administrative bodies to "interpret international and national patent rules consistently with human rights standards."[783]

In this regard, the Special Rapporteur gives as an example to be followed that of the compulsory licenses imposed by countries such as Brazil, Ecuador, India, Malaysia and Thailand and "issued for HIV/AIDS-related medicines, and for cardiovascular, cancer and hepatitis medicines."[784]

The case of the medicine *Glivec* from *Novartis* constitutes a textbook case. On 1 April 2013, the Indian Supreme Court rejected a request for a patent by the pharmaceutical giant for a new version of *Glivec*, a powerful treatment for leukemia.[785] Novartis, which was attempting to use *evergreening*, claimed that the recycled formula represented a significant improvement, allowing the body to better absorb the medicine. However, the Indian high court considered that the reworked *Glivec* did not fulfill the criteria of "novelty or creativity" required by Indian law. This opened the door to the sale of generic versions of the product. *Glivec* is still sold at US$ 4,000 per patient per month, while in India the current generic is available for under US$ 73.

This decision placed public health needs over economic interest, in full compliance with the objective of human rights, in particular economic, social and cultural rights. It contrasts with Western patent protection practice. Indeed, numerous "false innovations" in pharmaceuticals are patented in Europe and the United States, which considerably limits the search for true scientific discoveries.

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782 Ibid., § 104.
783 Ibid., § 98.
784 Ibid., § 80.
785 See https://main.sci.gov.in/jonew/judis/40212.pdf

2. UNESCO: Cultural Heritage and Cultural Diversity

According to Article 1 of its constitution,[786] the purpose of the ***United Nations Educational, Scientific and Cultural Organization*** (UNESCO) is "to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion". Thus, since its creation, UNESCO has asserted a link between, on the one hand, science and culture and, on the other, human rights.

Besides several declarations and recommendations, UNESCO member States have adopted the World Heritage Convention (1972), the Convention on the Protection of the Underwater Cultural Heritage (2001) and the Convention for the Safeguarding of the Intangible Cultural Heritage (2003). Although these instruments do not define with exactitude the rights of individuals and communities to cultural heritage, numerous links can be established between human rights and cultural heritage, including the participation of communities in its conservation.

In particular, the ***Convention for the Safeguarding of the Intangible Cultural Heritage*** recognized that "communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage."[787] It should be emphasized that under the Convention and the operational directives for its implementation, States may intervene only with the participation or the commitment of the communities, groups and persons concerned.[788]

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[786] Adopted 16 November 1945.

[787] Convention for the Safeguarding of the Intangible Cultural Heritage, Preamble.

This Convention also contains the obligation for States to include cultural heritage in education programs and to make known information on the existence and value of cultural heritage. Article 14 in particular requires that States strive to "(a) ensure recognition of, respect for, and enhancement of the intangible cultural heritage in society, in particular through: i) educational, awareness-raising and information programs, aimed at the general public, in particular young people; (ii) specific educational and training programs within the communities and groups concerned [...]".

For example, as provided for in the ***UNESCO Universal Declaration on Cultural Diversity*** (2001), the full respect of human rights and, in particular cultural rights, creates a context supportive of cultural diversity and is its guarantor (Art. 4, 5). The defense of cultural diversity is an ethical imperative, inseparable from the respect of human dignity. Its entails a commitment to respect human rights and fundamental freedoms, especially the rights of persons from minority groups and indigenous communities (§ 4). Freedom of expression, media pluralism, multilingualism, equal access to artistic expression, scientific and technological knowledge – including in digital form – and the possibility, for all cultures, to be represented in means of expression and dissemination, are the guarantors of cultural diversity (Art. 6).

In its Resolution 64/174 "Human Rights and Cultural Diversity", the United Nations General Assembly recalled the principle, now broadly accepted, that the promotion and protection of human rights, including cultural rights, on the one hand, and tolerance and respect for ***cultural diversity***, on the other, are mutually reinforcing.[789]

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[788] Convention for the Safeguarding of the Intangible Cultural Heritage, Arts 11, 15; Operational Directives for the implementation of the Convention for the Safeguarding of the Intangible Heritage, 2010, Directives 1, 2, 7, 12, 23, 79 to 82, 88, 101, 109, 157, 160, 162.

[789] A/RES/64/174, 18 December 2009, § 10.

The ***Convention on the Protection and Promotion of the Diversity of Cultural Expressions*** (2005) asserts that cultural diversity can be protected and promoted only if human rights and basic freedoms such as freedom of expression, information and communication, as well as the possibility for individuals to choose their forms of cultural expression, are guaranteed (Art. 2.1). The right to participate or not in the cultural life of certain communities, as defined by the decision-makers in these communities or by State authorities, is also fundamental to the protection of cultural diversity. The enjoyment of cultural freedoms by all can thus enrich cultural diversity.[790]

Moreover, the respect, protection and promotion of cultural diversity are essential to guarantee the respect of cultural rights. This connection is particularly visible in the area of the protection of national, ethnic, religious and linguistic minorities as well as indigenous peoples. As noted by the CESCR in its *General Comment No. 21*, States' "obligations to respect and protect freedoms, cultural heritage and diversity are interconnected", and it is not possible to guarantee the right to participate in cultural life without the obligation to "respect and protect the cultural heritage of all groups and communities" in all its forms.[791]

B. Pertinent Norms

1. At the International Level

Besides the major instruments mentioned above that enshrine cultural rights, many international treaties adopted under the aegis of the United Nations recognize these rights.

Article 27 of the ***International Covenant on Civil and Political Rights*** is intended to specifically protect minorities and their cultural particularities. This article provides that

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[790] UNDP, Human Development Report 2004, p. 23.

[791] CESCR, General Comment No. 21, § 50.

in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The ***International Convention on the Elimination of All Forms of Racial Discrimination*** asserts "the right to equal participation in cultural activities" (Art. 5.e.vi). This provision is not superfluous since it is not uncommon to see the cultural rights of certain categories of persons flouted based on criteria that the Convention explicitly defines as inadmissible.

States parties to the ***Convention on the Elimination of All Forms of Discrimination against Women*** commit themselves to taking appropriate measures to eliminate discrimination against women, in order to ensure, on the basis of male-female equality, the right to participate in all aspects of cultural life (Art. 13.c).[792]

Under the ***Convention on the Rights of the Child***, States must "respect and promote the right of the child to participate fully in cultural and artistic life" (Art. 31.2).

Under the ***International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***, migrant workers must benefit from equality of treatment with nationals of the State where they are employed regarding the right of access to and participation in cultural life (Art. 43.1.g).

This right is also enshrined in Article 30 of the ***Convention on the Rights of Persons with Disabilities***.

1. States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life […] 2. States Parties

[792] The relation between cultural rights and discrimination based on sex is the subject of a special report of the Special Rapporteur on Cultural Rights, A/67/287, 10 August 2012.

> *shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.* (Art. 30)

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) also contains provisions dealing with matters related to cultural rights, such as identity, language, belief systems, traditions and customs, participation in cultural life and cultural heritage.

The ***Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities***[793] enshrines in Article 2 the right of minorities to their own culture as well as the right to participate in the cultural life of the State in which they reside.

> *1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.*
> *2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.*

The ***United Nations Declaration on the Rights of Indigenous Peoples*** plays an important role in cultural rights. Its purpose is to protect indigenous populations and safeguard their right to maintain their own culture. For example, Article 5 states: "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." The Declaration also broadly mentions land and territorial rights, connecting them closely to the notion of cultural rights (Art. 26).

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[793] Adopted as General Assembly Resolution 47/135, 18 December 1992.

The ***United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*** recognizes that these persons have the right "to enjoy their own culture and to pursue freely their cultural development… to express their local customs, languages, culture, religions, literature and art", and requires that States take measures to "eliminate discrimination against the traditional knowledge, practices and technologies of peasants and other people working in rural areas" (Art. 26).

Other human rights that form part of cultural rights include, of course, the ***right to education*** (see chapter 7), recognized in particular in Articles 13 and 14 of the ICESCR and in Articles 28 and 29 of the Convention on the Rights of the Child. Referring to the World Declaration on Education for All, the Special Rapporteur on Cultural Rights emphasizes that "people develop their own particular but ever-evolving world visions and capacities through a lifelong process of education; and it is education that allows access to knowledge, values and cultural heritage."[794]

To these rights must be added, in particular, the right to education, to information and freedom of opinion and expression, to free association and to participation in decision-making, recognized in all regional and international instruments, which are rights indispensable for the enjoyment of cultural rights.

2. At the Regional Level

The ***American Declaration of the Rights and Duties of Man***[795] recognizes that:

> *Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He*

[794] Report of the Special Rapporteur on Cultural Rights, A/HRC/14/36, § 15.

[795] Adopted at the 9th International American Conference in Bogota (Colombia) in April 1948.

> *likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.* (Art. XIII)

Article 14 of the ***Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*** protects cultural rights in terms similar to those of Article 15.1 of the ICESCR.

Article 38 of the ***Charter of the Organization of American States*** provides that member States "extend among themselves the benefits of science and technology by encouraging the exchange and utilization of scientific and technical knowledge."

The ***African Charter on Human and Peoples' Rights*** (1981) mentions the right of everyone to freely take part in the cultural life of their community (Art. 17.2), as well as the right of all peoples to their "economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." (Art. 22.1)

These principles were reiterated in the ***Charter of African Cultural Renaissance*** (2006), which recognizes in its preamble that all cultures emanate from societies, communities, groups and individuals and that any African cultural policy must necessarily allow peoples to thrive so as to assume an increased responsibility in their own development. Moreover, its Article 15 requires that States "should create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities."

The ***African Charter on the Rights and Welfare of the Child*** recognizes the right of the child "to participate freely in cultural life and the arts" (Art. 12).

Article 22 of the ***Charter of Fundamental Rights of the European Union*** (of 18 December 2000) declares that the European Union "shall respect cultural, religious and linguistic diversity."

The ***Council of Europe Framework Convention on the value of Cultural Heritage for Society (the Faro Convention)*** of 27 October 2005, recognizes that "every person has a right to engage with the cultural heritage of their choice, while respecting the rights and freedoms of others, as an aspect of the right freely to participate in cultural life enshrined in the United Nations Universal Declaration of Human Rights (1948) and guaranteed by the ICESCR (1966)" (Preamble). Emphasizing "the need to involve everyone in society in the ongoing process of defining and managing cultural heritage", the Convention refers to the right to benefit from cultural heritage and to contribute to its enrichment, to the participation of everyone in "the process of identification, study, interpretation, protection, conservation and presentation of the cultural heritage" and to its access (Art. 4, 12, 14).

C. States' Specific Obligations in the Area of Cultural Rights[796]

In general terms, the ICESCR "imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life."[797]

More specifically, as in the case of the other rights enshrined by the ICESCR, the right to participate in cultural life imposes three categories of obligations: respect, protect, and fulfill.

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[796] This chapter's discussion of States' obligations regarding the right to participate in cultural life drawn chiefly on the CESCR's General Comment No. 21.

[797] CESCR, General Comment No. 21, § 45.

The obligation to ***protect*** is intrinsically linked to the obligation to ***respect***. The ICESCR is specific in this regard:

> *In many instances, the obligations to respect and to protect freedoms, cultural heritage and diversity are interconnected. Consequently, the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of [cultural rights].*[798]

These measures must allow all persons to freely choose their cultural identity, to enjoy freedom of expression and opinion in the language(s) of their choice and the right to freely seek, receive and transmit information and ideas without consideration of borders, to enjoy the freedom to create, to have access to their own linguistic and cultural heritage as well as that of other cultures and to freely, actively and with an open mind participate in "any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15.1.a."[799]

The obligation to respect and to protect also applies to cultural heritage, especially the cultural productions of indigenous peoples. The ICESCR specifies that "this includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations."[800] The attachment to land is considered a basic aspect of indigenous peoples' and peasants' culture (not only as a source of food and housing but also for purposes of religious rituals). Hence, if the State does not provide appropriate means – legislative or judicial – to exclude interference with this right or to remedy violations of it, the State is violating the Covenant's Article 15.1.a. It is clear that this is regularly flouted by many States, which allow the most extensive

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798 Ibid., § 50.
799 Ibid., § 49.e
800 Ibid., § 50.

possible exploitation of local resources by transnational corporations in disregard of the rights of the local populations.

Regarding the obligation to ***fulfill***, it has multiple facets and comprises the obligation to facilitate, to promote and to provide. Concretely, this means that the State must adopt policies of encouragement and provide financing and generally all measures possible to facilitate the exercise of this right for all individuals and communities, especially minorities, migrants, the disadvantaged and those requiring particular assistance owing to their situation (the aged, children, the disabled).

The ICESCR also insists on States' obligation to ensure the full exercise of the rights guaranteed by the Covenant, through international aid and cooperation, especially economic and technical cooperation.

> *In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 (a), of the Covenant is not impaired. For example, the strategies, programs and policies adopted by States parties under structural adjustment programs should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.*[801]

Environment Conducive to the Conservation, Development and Diffusion of Science

Under Article 15.2 of the ICESCR, the measures that States parties must take to ensure the full exercise of the right to participate in cultural life and benefit from scientific progress must "include those necessary for the conservation, the development and the diffusion of science and culture."

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[801] Ibid., § 59.

Conservation requires the identification and preservation of scientific knowledge, products and tools, including literature, databases, specimens and equipment.

Development implies an explicit commitment to developing science and technology for the benefit of human beings, for example by developing national plans of action. Generally, this implies the adoption of programs to support and reinforce research financed by public funds, developing partnerships with private business enterprises and other actors, such as farmers in the context of food security, and promoting freedom of scientific research.

Diffusion includes the dissemination of scientific knowledge and its applications both within the scientific community and throughout society overall, particularly through the publication of research results. Open communication of results, hypotheses and opinions from research is at the heart of the scientific process and offers the best guarantee of the accuracy and impartiality of scientific results. Diffusion of science is a requisite for public participation in decision-making and is essential to encouraging research and its applications.[802]

D. Examples of Implementation

1. At the National Level

In practical terms, all States are multi-ethnic and multi-confessional, including those that have become so owing to migration and even those defined as homogeneous in their constitution. Generally, cultural rights violations occur when States are confronted with new problems or, in many cases, when they are unwilling to respect these rights for their populations out of fear of calling into question "national identity". Thus, the majority or

[802] Ibid., §§ 45-48. See also the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications.

minority in power (depending on the country) discriminates against other components of the State. Sometimes, this discrimination is enshrined in national legislation, in flagrant violation of international commitments undertaken by the concerned States.

Most States have ratified the human rights conventions guaranteeing cultural rights, as well as ILO Convention No. 169 on indigenous and tribal peoples. And most of them have also incorporated the provisions of these documents into their national legislation. Given that cultural rights comprise several distinct rights, the way they are incorporated into national law – and the political will to fulfill them – differs greatly from one country to another.

Thus, how these rights can be fulfilled and invoked before the courts depends on a country's judicial system. Whatever the case, States parties to the conventions establishing cultural rights must provide domestic mechanisms allowing their concrete fulfillment. These are generally constitutional courts and administrative tribunals that are entrusted with upholding cultural rights when these are subject to litigation by individuals and the State.

In a ruling in April 2013, the Supreme Court of ***India*** rejected the appeal of the transnational corporation *Vedanta Resources* concerning its plan for mining on the sacred mountain of the Dongria Kondh, in the State of Orissa. In the Court's view, it was incumbent on those most affected by this mining project to decide their future.[803]

After a long legal battle, the Sami[804] in the Girjas Sameby district (***Sweden***) recovered their exclusive right to manage hunting and fishing on their ancestral lands following a ruling by Sweden's Supreme Court.[805]

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803 http://www.indiaenvironmentportal.org.in/files/Niyamgiri%20April%2018%202013.pdf

804 A people living in several Scandinavian countries.

805 https://www.loc.gov/item/global-legal-monitor/2020-02-14/sweden-supreme-court-recognizes-sami-indigenous-groups-exclusive-right-to-confer-hunting-and-

In recent decades, many cultural objects pillaged during colonization, occupations or wars have been returned to indigenous peoples and to States. Some countries have gradually acquired legislation to return these objects. For example, in 1997, the *New York Metropolitan Museum of Art* returned to ***Cambodia*** two heads from Khmer statues from the tenth and eleventh centuries.[806] France recently returned 26 "Dahomey Treasures" from the African kingdom located in the south of present day ***Benin***.[807] It is noteworthy that some 90% of African cultural heritage is missing from the continent and that awareness of the importance of returning such objects to the peoples to whom they belong is growing.

2. At the Regional Level

Although the European Convention on Human Rights does not explicitly protect cultural rights as such, the ***European Court of Human Rights***, using a dynamic interpretation of various articles of the Convention, has progressively recognized the existence of material rights that can fall into the category covered by the notion of "cultural rights" in its broad sense. The provisions most frequently invoked relative to cultural rights are the following: Article 8 (right to respect of private and family life), Article 9 (right to freedom of thought, conscience and religion) and Article 10 (freedom of expression) as well as Article 2 of Protocol No. 1 (right to education).

Another factor that can explain the growing importance of cultural rights in the Court's jurisprudence is the number of cases referred to the Court by individuals or national minorities, especially cultural, linguistic and ethnic minorities.[808] The cases mentioned

fishing-rights-in-sami-area/

806 https://unesdoc.unesco.org/ark:/48223/pf0000138519

807 https://www.quaibranly.fr/en/collections/living-collections/news/restitution-of-26-works-to-the-republic-of-benin

808 European Court of Human Rights, *Cultural Rights in the case-law of the European Court of Human Rights*, January 2011: https://www.culturalpolicies.net/wp-

below concern specifically access to culture, the right to cultural identity and linguistic rights.

In *Khursid Mustafa and Tarzibachi v.* ***Sweden***, the Court had the opportunity to rule on the right of migrants to maintain cultural ties with their country of origin. In this case – concerning the eviction of tenants because they had refused to take down a satellite antenna by which they received television programs in Arabic and Farsi from their country of origin (Iraq) – the Court developed its jurisprudence regarding the freedom to receive information under Article 10 of the European Convention on Human Rights. The Court stressed the importance of such freedom for an immigrant family with three children, who might wish to stay in touch with the culture and language of their country of origin. The Court also noted that the freedom to receive information is not limited to subjects related to events of public interest but also covers forms of cultural expression and simple entertainment.[809]

In *Chapman v.* ***the United Kingdom***, the court was asked to consider the question of the way of life of Gypsy families and the specific difficulties that they encounter in parking their caravans. In its ruling, the Grand Chamber recognized that Article 8 of the European Convention on Human Rights – which enshrines the right to respect of private and family life – also protects the right of a minority to preserve its identity and for its individual members to lead a private and family life in accordance with their traditions: "*The Court considers that the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a traveling lifestyle. This is the case even though, under the pressure of development and diverse policies or by their own choice, many Gypsies no longer live a wholly nomadic existence and*

content/uploads/2019/10/ECHR_Research_report_cultural_rights_ENG.pdf

[809] Application No. 23883/06, 16 December 2008, § 44, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90234#{%22itemid%22:[%22001-90234%22]}

increasingly settle for long periods in one place in order to facilitate, for example, the education of their children. Measures affecting the applicant's stationing of her caravans therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition."[810]

Regarding linguistic rights, especially the rights of persons belonging to linguistic minorities and foreigners, the Court allowed States parties considerable discretion.

Article 8 of the European Convention on Human Rights can also apply to the right of prisoners to be free to correspond in their own language. In *Mehmet Nuri Özen et al. v.* ***Turkey,***[811] the Court concluded that there was a violation of Article 8, ruling that there were no legal grounds for refusing to send the mail of prisoners when they wrote in the Kurdish language. This ruling attenuated the Court's previous jurisprudence on the question, which was restrictive, for example in the *Senger v. Germany* case.[812]

Linguistic rights can also be protected by freedom of expression as guaranteed by Article 10 of the European Convention. For example, in *Ulusoy et al. v. Turkey*,[813] the Court ruled that prohibiting the production of a Kurdish show in a municipal facility constituted a violation of freedom of expression.

The ruling of the ***Inter-American Court of Human Rights*** of 27 June 2012 in *Sarayaku v.* ***Ecuador***[814] marked an important victory for indigenous peoples and the protection of their cultural rights. This ruling ended a fight that had gone on for over ten years, led by the Sarayaku indigenous community. In 1996, after substantial reserves

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810 Application No. 27238/95, ECHR 2001-I (Grand Chamber), 18 January 2001, § 73.
811 Applications No. 15672/08, 11 January 2011.
812 Application No. 32527/05, 3 February 2009.
813 Application No. 34797/03, 3 May 2007.
814 http://www.corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

of oil had been discovered on the land of several indigenous communities, including the Sarayaku, a twenty-year concession was granted by the Ecuadorian national oil *company Petroecuador* to the *Compañía General de Combustibles S.A. (CGC)* to explore the area and exploit its resources. Not only were the indigenous communities not consulted regarding the project, but they were subject to violence, various forms of pressure and attempts at manipulation by the CGC and the Ecuadorian government to prevent them from thwarting the exploration operations. In reaction to these violations, the Sarayaku had undertaken an international campaign and had appealed to the Inter-American Commission in 2003 in order to oppose the "imposed oil activity on Sarayaku territory [which] meant militarization of their territory, environmental destruction, violence, and loss of elements [of] their culture and spiritual cosmologies."[815] In its ruling, the Court considered that the failure to consult the Sarayaku had undermined their cultural identity in that the destruction of, and interference in, their cultural heritage demonstrated lack of respect for their cultural and social identity, their customs, their traditions and their conception of the world and their way of life.[816]

A complaint was filed in 2003 with the ***African Commission on Human and Peoples' Rights*** by members of the Endorois community (an indigenous people) of ***Kenya*** for the loss of their property, the disruption of their communal pastoral activities and violations of the right to practice their religion and culture, as well as the disruption of the community's overall development. They contended that the government of Kenya had expelled them from their ancestral lands in the Lake Bogoria region by creating a nature reserve, without appropriate consultation nor adequate compensation, in violation of

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[815] "Confirming Rights: Inter-American Court Ruling Marks Key Victory for Sarayaku People in Ecuador", Cultural Survival Quarterly, No. 36-3, 17 August 2012: http://www.culturalsurvival.org/publications/cultural-survival-quarterly/confirming-rights-inter-american-court-ruling-marks-key

[816] *Sarayaku v. Ecuador*, Judgment of June 27, 2012, § 220.

several rights guaranteed by the African Charter, including the right to culture, recognized in Articles 17.2 and 3. In its ruling in November 2009, the Commission found that the Kenyan State's restriction of the Endorois populations' access to a lake that had cultural importance for them, "signified the refusal to the community of access to a system of beliefs, values, norms, mores, traditions and artifacts tied to the access to the lake."[817] Hence, the Court concluded that forcing this community to live on semi-arid lands without access to the medicinal plants and other resources vital for the health of their livestock created a serious threat to the community's pastoral life and constituted a threat to their cultural rights.[818]

In its ruling of 26 May 2017, the ***African Court of Human and Peoples' Rights*** also found against ***Kenya*** for having violated the cultural rights of the Ogiek people by driving them from their ancestral lands in the Mau forest, thus depriving them of the exercise of their traditional practices.[819]

3. At the International Level

During its consideration of the periodic report of ***Tanzania***, the ***CESCR*** noted, inter alia, that vulnerable communities, such as the herders and hunter-gatherers, had been driven from their traditional lands to make way for several projects (large-scale agricultural holdings, game reserves, extension of national parks, various

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817 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, § 250, https://www.escr-net.org/caselaw/2010/centre-minority-rights-development-kenya-and-minority-rights-group-international-behalf/

818 Ibid., § 251.

819 *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, § 190, https://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf

constructions, tourism and commercial hunting). The Committee was concerned that the restrictions on access to land and resources, the danger to the fauna, and the diminished access by the communities to decision-making processes threatened the fulfillment of their right to cultural life. It requested that Tanzania take measures, especially legislative, to protect, preserve and promote the cultural heritage and traditional ways of life of vulnerable communities, such as hunter-gatherers and herders.[820]

In its concluding observations regarding ***New Zealand***, the ***CERD*** noted that the *Maoris* are still victims of certain forms of discrimination, especially regarding the enjoyment of their rights related to the land and resources that they possess or traditionally use, in particular places with a cultural or traditional significance. Certain laws, for example, imposed disproportionately strict conditions on the Maoris for the enjoyment of these rights. The CERD also deplored that a court ruling favorable to the *Maoris* regarding their intellectual and cultural property rights was still not implemented. This finding reinforced the rights of the *Maoris* by recognizing their ties to nature and the environment in relation to conservation, language, cultural heritage, medicine and traditional healing. As in the case of other indigenous populations, the CERD also noted with regard to the *Maoris* that they are often not consulted, or not properly consulted, regarding commercial projects affecting the lands and resources that they own or traditionally use.[821] In subsequent new concluding observations of 2017, the CERD reiterated its concerns about the absence of the implementation of the recommendations of the Waitangi Tribunal regarding "Maori intellectual and cultural property rights and Maori treasured possessions, including language, culture and knowledge."[822] The

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820 CESCR, Concluding Observations on the periodic report of Tanzania, E/C.12/TZA/CO/1-3, 13 December 2012, §§ 22, 29.

821 CERD/C/NZL/CO/18-20, 1 March 2013.

822 CERD/C/NZL/CO/21-22, 22 September 2017, § 16.

CERD requested, inter alia, that New Zealand establish "a timetable for implementing the remainder of the recommendations contained in the Wai 262 decision" and "review the Marine and Coastal Area (Takutai Moana) Act of 2011 with a view to respecting and protecting the full enjoyment by Maori communities of their rights regarding the land and resources they traditionally own or use, and their access to places of cultural and traditional significance."[823]

Following its consideration of the periodic report of ***Germany***, the ***Human Rights Committee*** deplored "the persistence of racially-motivated incidents against members of the Jewish and Sinti and Roma communities as well as Germans of foreign origin and asylum seekers, [together with] the persistent discrimination faced by members of the Sinti and Roma communities regarding access to housing, education, employment and health care."[824] The Committee also deplored the persistence of "hate speech and racist propaganda on the Internet including from right-wing extremism, despite awareness-raising efforts and judicial measures taken on the basis of Sections 86 and 130 of [the German] Criminal Code."[825] The Committee requested the German State to take concrete measures "to increase the effectiveness of its legislation and to investigate all allegations of racially-motivated acts and to prosecute and punish those responsible". It further requested that the government grant the Federal Anti-Discrimination Agency "the power to investigate complaints brought to its attention and to bring proceedings before the courts, so as to enable it to increase its efficiency."[826] In 2021, the Committee examined Germany's subsequent periodic report and declared that it was still disturbed by the persistence of hate speech, "including verbal attacks, online hatred and hate speech in the

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823 Ibid., §§ 17, 21.

824 CESCR, Concluding Observations on the periodic report of Germany, CCPR/C/DEU/CO/6, 13 November 2012, § 17.

825 Ibid., § 18.

826 Ibid., §§ 6, 17.

context of political discourse, as well as about reports of a range of hate crimes."[827] The Committee requested, inter alia, that Germany "consider legal amendments to remove the requirement to disturb public peace from the definition of incitement to hatred."[828]

Following her visit to ***Malaysia*** (2017), the ***Special Rapporteur on Cultural Rights*** declared that she was concerned by, inter alia, "the use of the term 'race' in the Malaysian context interchangeably with religion or ethnicity." She thus asked the Malaysian government to "remove ethnic and religious affiliation from identity documents [...] and refrain from equating religion with ethnicity.[829] Further, she asked that the government take into account, in drafting tenure rights, "the diverse ways that indigenous peoples use land and their customary practices in this area", and that the government abolish "prior censorship bodies and processes" and take effective measures "to combat the 'moral policing' of women's dress."[830]

In 2012, the ***Special Rapporteur on the Rights of Indigenous Peoples*** carried out a visit to the ***United States*** and drafted a study on the living conditions of the country's indigenous populations. He concluded in his mission report that the indigenous peoples of the United States – Amerindians and natives of Alaska and Hawaii − who constitute dynamic communities and have made a major contribution to the life of the country, encounter enormous difficulties resulting from the serious large-scale harms they have suffered throughout history, especially the broken treaties and acts of oppression, as well as ill-advised government policies which today translate into various forms of precariousness and obstacles to the exercise of individual and collective rights. Among the disadvantaged conditions endured by the country's indigenous peoples, the Special Rapporteur pointed out that, with the loss of

827 CCPR/C/DEU/CO/7, 30 November 2021, § 10.
828 Ibid., § 11.
829 A/HRC/40/53/Add.1, January 10, 2019, §§ 37, 91.c.
830 Ibid., §§96.a, 97.d, 99.d

their lands, in particular owing to mining and other such "development" projects, they lost control over places of major cultural and religious significance. The desecration of sacred sites and the restriction of access to them inflicted a permanent suffering on these peoples for whom these sites are essential elements of their identity.[831] After another visit in 2017, the Special Rapporteur pointed out that "energy and infrastructure development on and near tribal territories have unique impacts on Indian communities that cannot be calculated in environmental or economic terms only. Any exploration, extraction or remediation effort must take into account the links to the health, society, culture and spirituality of local indigenous communities."[832] Hence, he requested that the United States government "adopt legislation to amend existing laws governing the protection of sacred and cultural places beyond present-day reservation boundaries so as to further protect the religious freedoms of indigenous peoples."[833]

Internet: a Crucial Issue

In barely four decades, the Internet has become unavoidable and indispensable in many areas of life. While this tool, among other functions, contributes greatly to the dissemination and archiving of information, knowledge and artistic and literary works, it is totally inaccessible to some populations[834] and can be manipulated to become a vector of cultural domination or political and economic manipulation.

Obstacles that are sometimes insurmountable thwart access to the Internet. They can be political (government censorship

831 A/HRC/21/47/Add.1, 30 August 2012.

832 A/HRC/36/46/Add.1, 9 August 2017, § 34.

833 Ibid., § 89.

834 In 2022, some 2.7 billion persons had no access to Internet, https://www.itu.int/en/mediacentre/Pages/PR-2022-09-16-Internet-surge-slows.aspx .

working hand in hand with corporate interests), economic (cost or monopoly), technical (language and training) or they may be linked to the question of governance, for there is no neutral international regulatory instance or international convention governing the Internet.

One can well understand – and wish – that, within a legal framework respecting human rights, the State would ensure oversight of this tool, for example to prosecute organized crime or racist propaganda. However, on the contrary, it is not uncommon for States to restrain, or even prohibit, Internet access for their political opponents and/or ethnic and religious minorities. This is why the CESCR insists that governments respect and protect freedom of information and expression, including on the Internet, to ensure the implementation of Article 15 of the ICESCR.

As everyone knows, significant gaps remain in access to the use of computers and Internet owing to income, education and geographical location.

The dominance of English on the web constitutes another obstacle for the overwhelming majority of humanity, who have no command of that language. It has been calculated that 63,7% of Internet sites use English and that almost three quarters of users cannot understand these sites without resorting to a translation tool.[835] As the English language has also become dominant in science[836] and culture, and as Internet plays an important role in

[835] https://www.statista.com/chart/26884/languages-on-the-internet/

[836] Consider the initiative of the World Intellectual Property Organization (WIPO), through its Access to Research for Development and Innovation (ARDI) program, to supply local not-for-profit organizations of the least developed countries free online access to the major scientific and technological periodicals and to supply offices of industrial property of certain developing countries online access at an affordable price to these same scientific and technological periodicals (https://www.wipo.int/ardi/en/about.html). However, this initiative is modest and in no way alters the paradigm underpinning the intellectual property rights

information flows and exchanges in those areas, the majority of humanity has no access to this knowledge.

The governance of the Internet is obviously a crucial matter. For the time being, everything is managed from the United States (regulation of domain names, IP addresses, decision-making about technical developments) by a body (ICANN) that is beholden to the State, notwithstanding its declaration of "independence" in 2016.[837] The State exploits its domination in this area for its own interests, as illustrated by its practices of spying on communications throughout the world, not to mention the use of users' data, stocked by American corporations that monopolize the world of the Internet (GAFAM).[838] The United States continues to refuse to yield the management of this tool to an international public body such as the United Nations.

system – the protection of the private property of financially powerful actors to the detriment of the interests of the end users of protected innovations.

837 Among others, see Jack Goldsmith & Tim Wu in *Who Controls the Internet?*, http://www.wethenet.eu/2012/05/les-etats-face-a-internet/ [French only]

838 I. e. Google, Apple, Facebook, Amazon and Microsoft.

CONCLUSION

The long struggles carried on by our predecessors have made possible today's recognition of economic, social and cultural rights in numerous international, regional and national instruments. The concrete examples mentioned in this book further demonstrate that the justiciability of these rights has become a reality thanks to popular mobilization, especially during the last two decades. Nonetheless, the situation remains far from satisfactory, for in practice, these rights are often neither respected nor fulfilled. Worse, they are often violated, and half of humanity is still deprived of essential needs (water, food, adequate housing, social security, decent work, etc.)

A better knowledge of these rights, of the obligations of States and of the other actors concerned (notably international institutions and transnational corporations), is indispensable for their effective realization. However, above all, concerted actions, as much at the national as at the international level, are indispensable. These actions must, as a matter of priority, address social, economic, and political aspects as well as the equitable distribution of wealth. Popular participation in decision-making, as well as coordination among all the peoples that make up a given State, at both national and international levels, is equally imperative. In keeping with their obligations to the populations within their jurisdictions, States must guarantee access to fundamental needs such as food, water, adequate housing, decent work, social security and health care, without discrimination of any kind.

As we have already mentioned, the absence of political will, as much as States' lack of means and the failings of international solidarity are some of the principal obstacles to the implementation of economic, social and cultural rights. Moreover, most States, by

choice or necessity, honor only their commitments to international economic and trade agreements, to the detriment of their human rights commitments, particularly those concerning economic, social and cultural rights. However, the United Nations institutions – where these very States are members – have many times affirmed that human rights take precedence over economic and trade agreements. Thus, it is intolerable that these States ignore their human rights commitments. Further, it is commonly admitted that peace, development and human rights are interdependent. In this regard, economic, social and cultural rights must be given priority by governments. Most of these rights (water, health, education, social security, etc.) are the responsibility of States and must remain public services. As to the others (decent work, adequate housing, food, culture), States, communities and public bodies must ensure that private interests do not take precedence over the common good. This is a matter of social cohesion, of respect for human rights, of democracy, and of citizens' place in our increasingly globalized societies.

In a world that today spends more than US$ 2 trillion per year on armaments and does not hesitate to periodically free up colossal sums to bail out the banking system, the financial excuses frequently pleaded to avoid implementing economic, social and cultural rights are not admissible when several billion persons are deprived of their rights. However, given the numerous obstacles to the effective realization of these rights, it is up to civil society, yet again, to mobilize and push governments to respect and to honor their commitments in these areas.

So our hope is that this book will reinforce the action taken by the social movements, NGOs and citizens who contribute every day to the struggle for the respect and the implementation of these rights, without which neither peace nor development, by and for all peoples, will be possible.

NON-EXHAUSTIVE LIST OF COMPLAINTS BODIES

At the international level

1. Treaty bodies of the UN

For any complaint to treaty bodies
Fax : +41(0)22 917 90 22 ; Email : ohchr-petitions@un.org
Website : https://www.ohchr.org/en/treaty-bodies

Committee on Economic, Social and Cultural Rights (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section /Committee on Economic, Social and Cultural Rights
Office of the United Nations
1211 Geneva 10, Switzerland
Email : ohchr-cescr@un.org
Website : https://www.ohchr.org/en/treaty-bodies/cescr

Committee on the Elimination of Racial Discrimination (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section /Committee of the Elimination of Racial Discrimination
Office of the United Nations
1211 Geneva 10, Switzerland
Email : ohchr-cerd@un.org
Website : https://www.ohchr.org/en/treaty-bodies/cerd

Human Rights Committee (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section / Human Rights Committee
Office of the United Nations
1211 Geneva 10, Switzerland
Email : ohchr-ccpr@un.org
Website : https://www.ohchr.org/en/treaty-bodies/ccpr

Committee on the Elimination of Discrimination against Women (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section /Committee on the Elimination of Discrimination against Women
Office of the United Nations
1211 Geneva 10, Switzerland
Email : ohchr-cedaw@un.org
Website : https://www.ohchr.org/en/treaty-bodies/cedaw

Committee on the Rights of the Child (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section /Committee on the Rights of the Child
Office of the United Nations
1211 Geneva 10, Switzerland
Email : ohchr-crc@un.org
Website : https://www.ohchr.org/en/treaty-bodies/crc

Committee on the Rights of Persons with Disabilities (complaints and inquiries)
Office of the United Nations High Commissioner for Human Rights
Petitions and Urgent Actions Section /Committee on the Rights of Persons with Disabilities
Office of the United Nations
1211 Geneva 10, Switzerland
Fax : +41(0)22 917 90 22 ; Email : ohchr-crpd@un.org
Website : https://www.ohchr.org/en/treaty-bodies/crpd

2. Special Procedures of the UN Human Rights Council

For all special procedures (complaints and inquiries)
OHCHR-UNOG
8-14 Avenue de la Paix
1211 Geneva 10, Switzerland
Email : urgent-action@ohchr.org
Website : https://www.ohchr.org/en/special-procedures-human-rights-council

Special Rapporteur on the right to food
Email : hrc-sr-food@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-food

Special Rapporteur on the rights to water and sanitation
Email : hrc-sr-watsan@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-water-and-sanitation

Special Rapporteur on the right to health
Email : hrc-sr-health@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-health

Special Rapporteur on the right to adequate housing
Email : hrc-sr-housing@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-housing

Special Rapporteur on the right to education
Email : hrc-sr-education@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-education

Special Rapporteur on cultural rights
Email : hrc-sr-culturalrights@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-cultural-rights

Special Rapporteur on unilateral coercive measures
Email : hrc-sr-ucm@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-unilateral-coercive-measures

Special Rapporteur on the human rights of migrants
Email : hrc-sr-migrant@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-migrants

Special Rapporteur on extreme poverty
Email : hrc-sr-extremepoverty@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-poverty

Special Rapporteur on the rights of Indigenous Peoples
Email : hrc-sr-indigenous@un.org
Website : https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples

3. UN Specialized Agencies

International Labour Organization (ILO)
4, route des Morillons, 1211, Geneva 22, Switzerland
Phone : + 41 (0)22 799 61 11 Fax : + 41 (0)22 798 86 85
Email : ilo@ilo.org
Website : https://www.ilo.org

ILO Committee on Freedom of Association (petitions)
Website: https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm

The representation procedure (against States by industrial associations of employers or of workers)
Website : https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/representations/lang--en/index.htm

Committee of Experts on the Application of Conventions and Recommendations (observations and inquiries)
Website : https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm

UNESCO (petitions)
Director of the Office of International Standards and Legal Affairs of UNESCO
7, place de Fontenoy, 75352, Paris 07 SP, France
Website : https://www.unesco.org

At the regional level

African Commission on Human and Peoples' Rights
31 Bijilo Annex Layout, Kombo North District Western Region P.O. Box 673 Banjul, Gambia
Phone : +220 441 05 05, 441 05 06 ; Fax : +220 441 05 04
Email : au-banjul@africa-union.org
Website : https://achpr.au.int

African Court on Human and Peoples' Rights
Mwalimu Julius Nyerere Conservation Centre,
Avenue Dodoma, Boîte Postale 6274, Arusha, Tanzania
Phone: +255-27 297 04 30
Email : registrar@african-court.org
Website : https://www.african-court.org/

Inter-American Commission on Human Rights
Organization of American States
1889 F Street, N.W., Washington, D.C. 20006, United States of America
Phone : +1 (202) 370 9000
Email : cidhoea@oas.org
Website : https://www.oas.org/en/iachr/default.asp

Inter-American Court of Human Rights
(Corte Interamericana de Derechos Humanos)
Avenida 10, Calles 45 y 47, Los Yoses, San Pedro, San José, Costa Rica
or Apartado Postal 6906-1000, San José, Costa Rica
Phone : +506 2527 1600 ; Fax : +506 2280 5074
Email : corteidh@corteidh.or.cr
Website : https://www.corteidh.or.cr/index.cfm?lang=en

European Committee of Social Rights
Department of Social Rights
Council of Europe
Directorate General of Human Rights and Rule of Law
1, quai Jacoutot , F-67075, Strasbourg Cedex, France
Phone : +33 (0)3 90 21 55 23 ; Fax : +33 (0)3 88 41 20 00
Website: https://www.coe.int/en/web/european-social-charter/european-committee-of-social-rights

European Court of Human Rights
Request to be submitted by post!
Council of Europe
67075 Strasbourg Cedex, France
Phone: +33 (0)3 88 41 20 18
Fax : +33 (0)3 88 41 27 30 ; +33 (0)3 90 21 43 10
Website : https://www.echr.coe.int/

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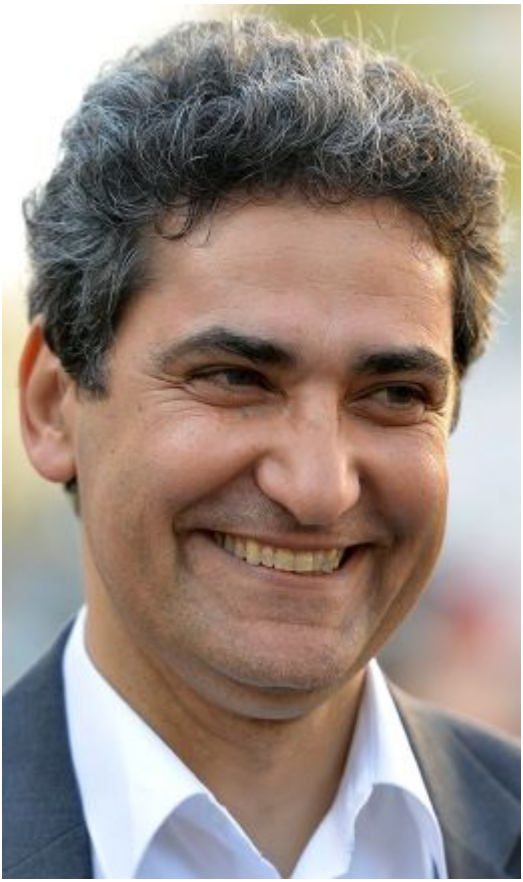

Melik Özden is the Director of CETIM (Europe – Third World Center) in Geneva. He has spent his life deeply involved in working among grassroots civil society and anti-globalization organizations, drafting human rights norms and working for their effective implementation forthe peoples of the world and of each individual. An expert on the internal workings of the United Nations system, he is the author of numerous articles and educational publications on economic, social and cultural rights as well as on the work of the United Nations human rights mechanisms, in particular the Human Rights Council.

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Melik Özden, Director, CETIM

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