

HUMAN RIGHTS, SOCIAL JUSTICE AND STATE LAW:

A Manual for Creative Lawyering

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NESRI NATIONAL ECONOMIC &
SOCIAL RIGHTS INITIATIVE



COLUMBIA LAW SCHOOL

HUMAN RIGHTS INSTITUTE

For more information about this Manual, contact:

HUMAN RIGHTS INSTITUTE, COLUMBIA LAW SCHOOL
435 West 116th Street, Box B-28
New York, NY 10027
(212) 854-2493 / (212) 854-3138 main
(212) 854-5736 fax
hri@law.columbia.edu / vesqui@law.columbia.edu

NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE
90 John Street, Suite 308
New York, NY 10038
(212) 253-1710
info@nesri.org

MARTHA DAVIS
Professor of Law
Northeastern University School of Law
(617) 373-8921
m.davis@neu.edu

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INTRODUCTION

The United States, widely recognized as the wealthiest country in the world in aggregate terms,¹ is also a country of economic and social extremes. Millions of Americans live without the basic necessities of human life, including adequate housing and health care. The U.S. Census Bureau has estimated that in 2006, 36.5 million Americans, or 12.3% of our population, lived in poverty, and a record 47 million Americans lacked health insurance.² An estimated 3.5 million Americans, 1.35 million of whom are children, are affected by homelessness each year,³ and millions more live in substandard housing conditions. Despite an obesity epidemic, the U.S. Department of Agriculture reports that 11 million Americans suffered from hunger in 2006 while 35 million, or 12 percent of the population, faced food insecurity.⁴

As these indicators reflect, recognition and protection of economic and social rights in the U.S. is uneven and far from adequate. With the exception of the right to property, economic and social rights are largely absent from the U.S. Constitution. Our federal Constitution is primarily a system of negative rights that protects against harmful government action but does not create positive obligations for the government. Thus, even if economic and social rights were enumerated within this system, full implementation of these rights would be severely limited under a domestic framework. As a result, when our political leaders hesitate to ensure essential social and economic services, especially for the poor, our courts fail to provide remedies for this denial of basic social protection. This is the case even when such protection would result in a lesser expenditure of resources (for example, when housing a family would be far less expensive than removing children into foster care as we do due to homelessness).⁵

In contrast, international human rights law makes governments responsible for taking measured, concerted steps to respond to poverty, hunger, disease, unemployment, and other socio-economic crises. Treaties and international instruments such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Universal Declaration on Human Rights (UDHR) explicitly recognize individuals' rights to housing, food, health care, work, and education. When countries, including the United States, permit such pervasive levels of poverty to exist and do not take sufficient measures to curb them, they fail to meet these international standards.

The majority of the U.S. public supports the idea of universal human rights and believes that economic and social rights such as equal access to public education, healthcare, fair pay to meet basic needs, freedom from extreme poverty, and adequate housing should be counted among the most fundamental human rights. In fact, most Americans agree that the role of government in human rights should be as the "protector" and "provider," and two-thirds agree that upholding human rights may mean expanding government assistance programs for things such as housing, food, health care, and jobs.⁶

1 See, e.g., World Development Indicators Database, World Bank, July 1, 2007, at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>.

2 Income, Poverty, and Health Insurance Coverage in the United States: 2006, U.S. Census Bureau (August 2007), at <http://www.census.gov/prod/2007pubs/p60-233.pdf>, 11, 19.

3 National Law Center on Homelessness and Poverty, 2007. The authors would like to thank the National Law Center on Homelessness & Poverty (NLCHP) for their contribution and encouragement in the production of this Manual.

4 For more detailed information on the USDA report and food insecurity in the U.S. generally, see <http://www.frac.org/index.html>.

5 See, Tilden v. Hayward discussed *infra*, 1990 WL 131162, at *17 (Del. Ch. 1990).

6 Opportunity Agenda Survey at http://www.americas-world.org/digest/global_issues/human_rights/HRinGen.cfm.

Many state constitutions are more akin to human rights law than they are to the federal Constitution, in that they explicitly incorporate “positive” rights to health, education, welfare, and housing. While advocates, scholars, and courts have historically focused on these provisions in attempting to develop independent state-level jurisprudence, rarely have they considered the role that transnational law, which consists of international human rights law and foreign law, might play in judicial review of these constitutional provisions.⁷ Likewise, little attention has been paid to the idea that state law, and specifically state constitutions and legislation, might play a valuable role in developing a cogent, fair, and rational framework for enforcing internationally-recognized social and economic rights in the context of our federal system.

As Professor Martha Davis has recently written, “transnational law can inform the meaning of state constitutional grants that have no federal analogues but that are similar to international human rights law and to provisions of modern constitutions around the world.”⁸ Indeed, many modern state constitutions that articulate “positive” rights were inspired by international laws and policies. Additionally, the relatively populist structure of state institutions, including state courts, has historically prompted them to look beyond their own borders to other states and countries for normative as well as practical guidance. State courts can look to transnational law for its inspiration or persuasiveness, rather than for binding authority. Many state courts, and even the U.S. Supreme Court, have already acknowledged the relevance of transnational law in constitutional cases.

This manual is written to help lawyers consider the role of transnational law as an interpretive tool in state constitutional and other state law litigation to protect economic and social rights.⁹ In Chapter I, the manual provides an overview of the relationship between state law and transnational law. In Chapter II, the manual covers key economic and social rights and provides examples of how courts have found those rights to be justiciable in a range of contexts. The principal economic and social rights discussed in Chapter II are:

- The right to health
- The right to housing
- The right to food
- The right to work
- The right to education
- The right to social security

In Chapter III, the manual provides strategies for employing transnational law, specifically international human rights and foreign law, in state constitutional and statutory litigation.

7 References to transnational law throughout the Manual refer to both international human rights law and foreign law.

8 Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev.L. & Soc. Change, 359, 360 (2006).

9 It is important to note that international human rights law protections for civil and political rights can also be used to protect and promote economic and social rights. Many civil and political rights have analogues in the federal and state constitutions. Additionally, federal constitutional protections of due process and equal protection have been creatively employed, with limited success, to guarantee economic and social rights. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, (1993); *Goldberg v. Kelly* 397 U.S. 254 (1970); *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

CHAPTER 1

HUMAN RIGHTS LAW AND STATE JURISPRUDENCE

National, multinational, and international human rights charters and courts today play a prominent part in our world. The U.S. judicial system will be the poorer, I have urged, if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.

- Justice Ruth Bader Ginsburg



The question today is not whether state court judges should consider the work of foreign constitutional courts when we interpret our state's constitution. The question is whether we can afford not to. As state jurists, might we not begin to demand of ourselves and of members of the bar who appear before us a transnational look at novel issues of individual rights? Participating in the global conversation about human liberty will keep our courts a vital part of the local community we serve and of the world community into which we and our constitutions are now so tightly woven.

- The Honorable Margaret H. Marshall

A. WHY SOCIAL JUSTICE LAWYERS SHOULD ENTER THE TRANSNATIONAL DIALOGUE

To the extent that U.S. law recognizes substantive economic and social rights, it is mainly through state constitutions. Social justice litigators and scholars have been collectively working to give meaning to these rights for over a generation. While there have been several successful cases, the progressive legal community faces: 1) an inherently decentralized effort due to working in fifty independent jurisdictions; 2) limited positive jurisprudential precedent; 3) flawed federal models that may influence state courts; and 4) a lack of awareness about alternative legal systems that can offer compelling analyses to support economic and social rights.

Entering the transnational dialogue on the meaning and implementation of economic and social rights protections through state level litigation would mean looking at both international human rights law as found in treaties and declarations *and* foreign law (i.e. which includes the way courts around the world interpret rights found in their constitutions, legislation and ratified treaties applicable to their countries). Using this body of law in state litigation offers social justice lawyers working at the state level various advantages. It can provide the conceptual cohesion and criteria for considering economic and social rights issues that are absent from our national-level dialogue. In particular:

- Transnational law can be a useful **tool for interpreting state constitutions and legislation** through a common dialogue and language.
- Transnational sources offer a wide range of **jurisprudential precedent and models** from which state courts can learn and through which they can participate in a global exchange of ideas.
- State court development of international principles provides fertile territory for **creating a dialogue on human rights** between the national and state levels.

For these and other reasons, a transnational approach, incorporating human rights principles into state-level legal work, when done strategically and thoughtfully, holds promise for the future.

B. WHAT IS THE RELATIONSHIP BETWEEN STATE LAW AND TRANSNATIONAL LAW?

As a general matter, international law is as binding on state courts as it is on federal courts. Whether international law is created through ratified treaties or is customary law created through judicial

opinion and nation-state practice across the globe – which more closely resembles federal common law – international law is part of federal law.¹⁰ International law therefore applies to the states through the Supremacy Clause, which defines federal law, including ratified treaties, as the supreme law of the land.¹¹ In fact, some state constitutions include explicit provisions to this effect. In Maryland and West Virginia, for example, the state constitutions expressly provide that treaties are the supreme law. Other states adopt the U.S. Constitution and therefore the Supremacy Clause.¹² Human rights obligations in particular bind every official and every level of government. As the U.S. State Department website notes, human rights obligations must be “implemented at the appropriate government level – federal, state or local.”¹³

With regard to international treaties on economic and social rights, however, the United States has made – at best – very weak commitments and it is therefore difficult to argue that these standards are binding federal law and trigger application of the Supremacy Clause. Until a country ratifies a treaty, or unless a legal norm is so widely accepted that it becomes part of customary law, human rights standards are considered “soft law” and not binding obligations. The U.S. has not ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Rights of the Child (CRC). The U.S. has ratified the Charter of the Organization of the American States (OAS) – a regional treaty that includes obligations to ensure fundamental economic and social rights (including the right to education, housing, healthcare, food, work, and social security) – but the U.S.’s obligations under this treaty have yet to be understood by U.S. courts.¹⁴

Nonetheless, even as non-binding law, economic and social rights found in international law documents and as interpreted by foreign courts can be highly relevant and persuasive. These are a source of comparative law, meaning that courts can look to these cases and standards to compare approaches and to consider which is more persuasive, in the same way a court might look to the jurisprudence of a sister state within the United States.

Moreover, any relevance that international legal standards relating to economic and social rights might have in the United States at present is most likely at the state level because the nature of our federal system places both the primary authority and responsibility for enforcement of these rights squarely on the individual states. Not only does our federal Constitution under current interpretations limit itself to civil and political rights, but it also precludes Congress from addressing many areas affecting economic

10 44B Am. Jur. 2d International Law § 12 (2008).

11 Article VI, Clause 2 of the United States Constitution, which reads: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (emphasis added)

12 Davis, *The Spirit of Our Times*, at 366-67.

13 <http://www.state.gov/s/1/38637.htm>

14 Pursuant to the OAS Charter, the member countries of the Inter-American system promulgated the American Declaration on the Rights and Duties of Man, which includes protections for economic and social rights. The state parties in the Inter-American System also voted, with no dissents, in favor of three resolutions explaining that the Declaration was an instrument that interpreted the OAS Charter and was binding on member states. The Inter-American Court has further clarified that the Declaration is binding, but few domestic courts have addressed the issue and the ones that have failed to understand the legal relationship between the Declaration and the Charter.

and social human rights. Even where Congress has authority under the Constitution’s Spending Clause to regulate programs addressing food, housing, welfare, etc., the current trend in Congress is to provide ever-increasing flexibility and authority to the states regarding how to implement those programs.

As Justice Margaret H. Marshall of the Massachusetts High Court has stated, “state judges are uniquely positioned to take advantage of the significant potential of comparative constitutional law.”¹⁵ She offers three compelling arguments in favor of this proposition: 1) Comparative law is the norm for state courts as they typically look to at least 49 other jurisdictions for persuasive authority; 2) State courts work in the open tradition of the common law which is consistent with comparative analysis; 3) State constitutions, which often include positive rights, more closely resemble foreign constitutions than they do our federal Constitution. As Justice Marshall has noted, it makes no sense that state courts seek a wide range of persuasive authority – even considering law review notes of second year law students – without taking into account what their judicial counterparts are doing in courts around the world.¹⁶

In short, transnational law is a source of comparative law that may inform, enlighten, and guide a state court through a difficult jurisprudential issue. Transnational law involves looking beyond domestic jurisprudence to international human rights and foreign law for guidance to resolving legal questions that are not unique to one country or legal system. Despite ongoing challenges, issues regarding how to implement economic and social rights have been addressed in cases in other regions, such as Europe, Canada and South Africa. These cases employ standard judicial tools such as “reasonableness” to operationalize the less familiar concepts in international human rights law discussed in Chapter II, such as “progressive implementation,” while maintaining a proper balance between courts and legislatures. These cases can therefore serve as important comparative sources for state constitutional litigators challenging economic and social rights violations in the United States.

C. WHAT IS THE CURRENT PRACTICE WITH REGARDS TO TRANSNATIONAL LAW?

Transnational law is being cited more frequently in U.S. jurisprudence. Indeed, several high profile U.S. Supreme Court cases have used transnational law – both foreign and regional law as well as international treaties – to interpret major constitutional issues in recent years.¹⁷ As Justice Kennedy pointed out in

¹⁵ The Honorable Margaret H. Marshall, “*Wise Parents Do Not Hesitate to Learn from their Children*”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633, 1641 (2004).

¹⁶ *Id.* at 1641-42.

¹⁷ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that criminal prohibition on homosexual sexual activity was unconstitutional). In *Lawrence*, the Court’s explanation of its decision to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986), which upheld criminal sodomy laws, cited to a 1963 report from the British Parliament recommending the repeal of laws that punish homosexual conduct, as well as a case from the European Court of Human Rights that held that proscriptions against consensual homosexual conduct in Northern Ireland were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981), at para. 52. A vast majority of states had repealed sodomy laws, and in other states sodomy laws had been overturned by the courts even after *Bowers v. Hardwick*. To Justice Kennedy, “[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 572. See also *Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005) (citing to the Convention on the Rights of the Child, art. 17, the ICCPR, art. 6(5), the American Convention on Human Rights, art. 4(5), and the African Charter on the Rights and Welfare of the Child, art. 5(3) in its decision finding the juvenile death penalty unconstitutional); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting that the Court’s observation that race-conscious programs “must have a logical end point” is in accordance with the international understanding of affirmative action, citing to CERD, art. 2(2) and CEDAW, art 4(1)); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (recognizing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved” in holding the practice to be unconstitutional).

[t]he opinion of the world community, while not controlling . . . does provide respected and significant confirmation for our own conclusions. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Both state and federal court decisions have recognized the persuasive value of international human rights and foreign law.

Examples include:

- ✦ In *Moore v. Ganim*, 233 Conn. 557 (Conn. 1995), individuals eligible for general assistance benefits brought an unsuccessful action against city and city officials, challenging the constitutionality of a statute terminating general assistance benefits after nine months. In the concurrence, Justice Ellen Peters relied on the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Universal Declaration on Human Rights (UDHR) to differ with the majority and interpret the Connecticut constitution to require a minimal social welfare safety net for the poor. She looked to the UDHR and the ICESCR, among other sources, to support her contention that “contemporary considerations of law and public policy” mandate governmental responsibility to provide for the poor. Although the United States is not a party to the ICESCR, she noted that it represented “wide international agreement on at least the hortatory goals” contained within.
- ✦ In *Boehm v. Superior Court*, 178 Cal.App.3d 494 (Cal.App. 1986), the California Court of Appeals cited the UDHR to support its interpretation of California’s welfare statute. In the decision, the court relied heavily on international human rights law for guidance. Specifically, the Court of Appeals held that the statute required the county to provide for minimum subsistence and relied on the UDHR to determine what that entailed. The court concluded that “it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation, and medical care.” The court added that “to leave recipients without minimum medical assistance is inhumane and shocking to the conscience.”
- ✦ In *Sterling v. Cupp*, 290 Or. 611 (1981), the Oregon Supreme Court looked to international legal standards regarding the treatment of prisoners to determine the standard of treatment required by the state constitution.

- ✦ In *Commonwealth v. Sadler*, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979), a trial court reviewed the conviction of a 15-year-old youth to determine, *inter alia*, whether the state had violated the Pennsylvania constitution by failing to provide the defendant schooling while in custody because he was certified to be tried in adult court. The court noted that the right to education is established under the UDHR and is fundamental to American democracy and found that a “boy in custody, regardless of his status under the criminal law, is still a child and entitled to the education rights of all children.”

- ✦ In *Beharry v. Reno*, 183 F.Supp.2d 584 (E.D.N.Y. 2002) (rev’d on other grounds), a federal judge in the Eastern District of New York evaluated the retroactivity of the federal immigration statute’s mandatory deportation requirement in light of treaty obligations and customary international law standards that recognize the right to family integrity and the best interest of the child standard.

Like the courts cited above, many state courts have turned to the UDHR or other sources of international law when addressing basic rights.¹⁹ State courts have not typically viewed the relevance of transnational law to domestic policy as controversial. As one among fifty, each state is accustomed to looking to sister states for jurisprudential and policy ideas.²⁰ Likewise, state courts have invoked transnational law for similar reasons as their sister courts in other nations, referencing transnational law in support of both majority and dissenting opinions without raising hackles among their judicial colleagues or other branches of state government.²¹

It is worth noting that this use of transnational law by U.S. courts in recent decades has occurred in the context of increasing legislative and executive interest in transnational law at the state level. For example, California has enacted state legislation implementing the Vienna Convention regarding consular notification for foreign nationals who are defendants in death penalty cases.²² Massachusetts created a Commission on the Status of Women, which has a mandate to implement international law standards.²³

19 See, e.g., *Bixby v. Pierno*, 4 Cal.3d 130 (1971); *Jamur Productions Corp. v. Quill*, 51 Misc. 2d 501, 509 (N.Y. Sup. Ct. 1966); *Wilson v. Hacker*, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950).

20 Marshall, “*Wise Parents Do Not Hesitate to Learn from Their Children*,” 79 N.Y.U. L. Rev. at 1641-42.

21 A recent commentator reviewing decisions from a number of nations in which judges refer to international law identified five, quite substantial, justifications offered for this practice: (1) concern for the rule of law; (2) desire to promote universal values; (3) reliance on international law to uncover values inherent within domestic regime; (4) willingness to invoke logic of judges in other jurisdictions; and (5) concern to avoid negative assessments within the international community. Reem Bahdi, *Globalisation of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts*, 34 Geo. Wash. Int’l L. Rev. 555, 556-57 (2002).

22 See Cal. Penal Code s. 834c. The California legislature also recently approved a CEDAW statute which would have brought California law into line with international human rights obligations that the federal government has not yet recognized. The bill was, however, vetoed by Governor Schwarzenegger. See *California National Organization for Women Cheers, Jeers, Governor*, Oct. 4, 2004, at www.canow.org/news/press/billspr.pdf (noting Governor’s veto of AB 358, which would have incorporated CEDAW principles into California law).

23 Cal. Penal Code s. 834c; Mass. G.L. Ch. 3, s. 66(3) (Massachusetts Commission on the Status of Women shall be guided by the Beijing Platform).

D. WHAT ARGUMENTS SUPPORT THE USE OF TRANSNATIONAL LAW IN STATE COURTS?

In addition to the general argument that state courts are well versed in comparative law and should take full advantage of transnational sources of law, there are at least three arguments that can be made – depending on the state constitution and the issue at hand – that transnational law has particular value for judicial interpretation:

- ✦ The *first* is that the history of certain state constitutions may support, if not compel, looking to foreign and international law to understand the meaning of the rights contained in them. For example, Professor Vicki Jackson has traced the Montana constitution’s provisions on “human dignity” to origins in the UDHR. The 1972 amendment to Montana’s constitution, which included the term “human dignity,” was drawn from Puerto Rico’s constitution. During the drafting of Puerto Rico’s constitution, “the United Nations played a key role, both in inspiring provisions based on the [UDHR] and as a vehicle for attempted resolution of the Commonwealth’s relationship to the United States.”²⁴ Additionally, the legislative history of Section 3 of New York’s constitution, granting the right to health, suggests that the framers, as well as the public who ultimately approved the provision in 1938, were responding to both specific health needs of the state and an international dialogue on public health and state responsibility in which many New Yorkers participated.²⁵ With respect to this legislative history, Professor Martha Davis notes: “Given this context, New York’s state constitutional reference to health can only be properly understood with reference to the international law of public health.”²⁶

- ✦ The *second* argument is that transnational jurisprudence may offer precedent and models that are far more on point for the case at hand than anything in the federal system or even sister states. Economic and social rights, with some notable exceptions, are still woefully underdeveloped in federal jurisprudence. Consequently, state courts have been inappropriately influenced by federal precedents. For example, state courts have adopted weak rational review standards for economic and social rights issues – despite the clear differences between federal and state constitutions and strong arguments developed by scholars and practitioners that such precedents are inapplicable in a state constitutional context.²⁷ The United States is not entirely unique in this regard, as economic and social rights are underdeveloped generally across the globe. However, there are jurisdictions that have grappled with key issue such as

²⁴ Vicki Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 24 (2004).

²⁵ Davis, *The Spirit of Our Times*, at 390-95.

²⁶ Davis, *The Spirit of Our Times*, at 394.

²⁷ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1169-70 (1999). Hershkoff examines how constitutional challenges to state legislation that has failed to protect social and economic rights granted by state constitutions can be greatly limited by a state court’s misguided application of the federal rationality test to review the state legislature’s actions. A state court engaged in rationality review asks only if the challenged legislation is within the scope of legislative power and does not evaluate whether the legislation actually succeeds in fulfilling the constitutional mandate. International human rights law, however, offers an alternative approach to constitutional review, in which the court must ask if the challenged legislation achieves the fulfillment of the right, rather than simply whether the legislature acted within its power.

the relationship between courts and legislatures, the standard of review for positive health or housing rights, and appropriate remedies. Such precedents may represent the only available cases directly on point, and thus the most relevant sources of law for state courts developing economic and social rights provisions in their own constitutions. Finally, looking towards genuinely relevant transnational precedent and international standards may uncover values inherent within domestic law.

- ✦ The *third* argument is that state courts should be part of the transnational dialogue on economic and social rights simply because it is a vital conversation that promotes universal values. Such participation also enhances (and protects) the image and role of the United States in the international community. Only by participation can the U.S. legal community safeguard and build its influence globally. Moreover, participating in that “global conversation” provides an additional framework and bridge for dialogue between states on these compelling issues by offering a common language for judicial exchange. Judges are only likely to undertake this dialogue, however, if they have adequate exposure to economic and social rights jurisprudence. State constitutional litigation provides an opportunity for just such exposure.

CHAPTER I: QUESTIONS FOR DISCUSSION

1. What can be gained by incorporating transnational law into state level litigation?
2. What are the possible disadvantages?
3. What are the challenges and obstacles to bringing transnational law into existing litigation efforts under state constitutions?
4. What are some strategies to overcome those obstacles?
5. What does the current practice regarding use of transnational law reveal about its potential value?
6. Would it be possible or desirable for its use to be more consistent and widespread?
7. What arguments are likely to be the most persuasive to state courts for the use of transnational law?
8. How can we strengthen the current arguments in support of using transnational law?

HUMAN RIGHTS TREATIES ADDRESSING ECONOMIC AND SOCIAL RIGHTS

International Covenant on Economic, Social & Cultural Rights (ICESCR): Principal human rights treaty regarding economic and social rights, which protects the right to work, to family life, to an adequate standard of living, including food, housing, and social security, to the highest attainable standard of health, to education, and to take part in cultural life, and prohibits all forms of discrimination in the enjoyment of these rights.

International Covenant on Civil & Political Rights (ICCPR): Civil and political rights counterpart to the ICESCR. While not focusing on economic and social rights per se, the ICCPR is important because rights protected by the ICCPR—such as the prohibition of discrimination in the protection of *any* right—can be invoked to protect economic and social rights.

Convention on the Rights of the Child (CRC): Principal human rights treaty on the rights of children, which includes extensive economic and social rights provisions.

International Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW): Principal human rights treaty on sex discrimination, which provides for women’s equal access to—and equal opportunities in—private, political and public life, including education, health and employment.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Principal human rights treaty on racial discrimination. Specifically prohibits discrimination in the areas of education, health, housing, property, social security, and employment.

The Charter of the Organization of American States (OAS Charter) and the American Declaration on the Rights and Duties of Man: The OAS Charter and American Declaration together create obligations to guarantee all of the fundamental economic and social rights (including the right to education, housing, healthcare, food, work and social security).

American Convention on Human Rights: The American Convention codifies the OAS Charter. While the Convention focuses primarily on civil and political rights, it generally recognizes their interdependency with economic and social rights, and Article 26 specifically recognizes states’ duties to progressively realization of those rights.

STATUS OF U.S. RATIFICATION¹

	<i>Signed by President</i>	<i>Ratified by Senate²</i>
ICESCR	X	
ICCPR	X	X ³
CRC	X	
CEDAW	X	
CERD	X	X
OAS Charter & Declaration	X	X ⁴
American Convention	X	

Footnotes:

¹ Ratified treaties are subject to any reservations and limitations attached to the treaties by the U.S. upon signing and ratification, referred to as Reservations, Understandings and Declarations (RUDs). The “package” of RUDs typically attached by the U.S. to human rights treaties limits any change to existing U.S. law by requiring, for example, that the obligations of the treaty are considered valid only to the extent that they are not inconsistent with the U.S. Constitution, and that they are “non-self-executing,” meaning implementing legislation is required before they take effect.

² The ICCPR’s prohibition of discrimination is therefore important to the pursuit of social and economic rights in the U.S. context, because the ICCPR, unlike the ICESCR, has been ratified by the U.S. and is binding on U.S. courts.

³ The U.S. executive branch and some U.S. courts have rejected the binding character of the American Declaration, despite determinations to the contrary issued by the Inter-American Court and despite the U.S. having voted for regional resolutions making the Declaration a binding instrument.

⁴ The U.S. executive branch and some U.S. courts have rejected the binding character of the American Declaration, despite determinations to the contrary issued by the Inter-American Court and despite the U.S. having voted for regional resolutions making the Declaration a binding instrument.

CHAPTER 2

THE ECONOMIC AND SOCIAL RIGHTS FRAMEWORK



Influenced considerably by remarkable leadership on the part of the United States, international human rights law arose out of the moral and political wreckage of the Nazi genocide during World War II. It was based on the simple premise that *people have a range of basic inalienable rights by virtue of the fact that they are human*. These rights – which required nation-states to respect and ensure human freedom and dignity – were not tied to any nationality or particular legal status. They were immutable and universal. On December 10, 1948, the U.N. General Assembly codified these principles by unanimously adopting the Universal Declaration of Human Rights (UDHR) as a bulwark against oppression and discrimination.

The UDHR marked the first time that human rights, including economic and social rights, were set forth comprehensively in such detail at the international level. It also represented the first international recognition that all human rights and fundamental freedoms are applicable to every person, everywhere. In this sense, the UDHR was a landmark achievement in world history. Today, it continues to affect people's lives and inspire human rights activism, legislation and constitutional review all over the world.

The UDHR is remarkable in several fundamental respects. In 1948, the then 58 member states of the United Nations represented a range of ideologies, political systems and religious and cultural backgrounds, as well as different stages of economic development. The authors of the UDHR, themselves from different regions of the world, sought to ensure that the draft text would reflect these different cultural traditions and incorporate common values inherent in the world's principal legal systems and religious and philosophical traditions. Most important, the UDHR was to be a common statement of mutual aspirations – a shared vision of a more equitable and just world.

The success of the authors' endeavor is demonstrated by the virtually universal acceptance of the UDHR. Today, the UDHR, translated into nearly 250 national and local languages, is the best-known and most cited human rights document in the world. As the foundation of international human rights law, the UDHR serves as a model for numerous international treaties and declarations and is incorporated in the constitutions and laws of many countries.

In many ways, the UDHR and the subsequent human rights instruments it inspired shepherded the world into the modern era of rights by introducing and/or reinforcing at least five key concepts:

- 1) All human rights have both negative and positive components (i.e. they address both what government should and should not do);
- 2) Human rights include the economic and social sphere, in particular issues of education, housing, health, work, food and social security;
- 3) Rights are universal, transcending national borders, and their legitimacy is no longer dependent on national recognition;
- 4) Prohibitions on discrimination in the protection of human rights extend both to the purpose and the effect of government action and inaction; and
- 5) Human rights are interdependent and cannot be viewed in isolation.

These basic concepts led to the development of jurisprudence all over the world. Some of this jurisprudence touches on the components of economic and social rights, the contours of government obligation with regard to protection and implementation, and the judicial standard of review. Each of these will be discussed in turn below.

A. WHAT ARE THE KEY ECONOMIC AND SOCIAL RIGHTS AND THEIR COMPONENTS?

Although there are a number of ways to list the basic economic and social rights, for purposes of this manual we will divide them into six categories:

Health ✓ Housing ✓ Education ✓ Decent work ✓ Food ✓ Social security ✓

Each of these has core components which further define the right. For example, the right to health includes, among other things, access to affordable, quality, culturally appropriate health care, a healthy environment and safe working conditions, and guarantees that health facilities are geographically available. Similarly, the right to housing guarantees adequacy and affordability as well as security of tenure. These elements of the rights are spelled out in “General Comments” issued by United Nations committees created to oversee the implementation of human rights treaties. We have included the relevant general comments at Appendix 1. The six tables below provide a basic overview of the components of each of these rights.

The right to health guarantees the right to the highest attainable standard of physical and mental health.* Additionally, the right to health affords special protections for maternal, child and reproductive health, disabled persons, ethnic minorities, indigenous populations, the elderly, and persons with HIV / AIDS.

<p>Availability.</p> <p>There must be a sufficient quantity of public health care facilities, goods and services geared to the satisfaction of both physical and mental needs. At a minimum, this includes safe drinking water, adequate sanitation, hospitals and clinics, trained medical personnel receiving domestically competitive salaries, and essential drugs.</p>	<p>Accessibility.</p> <p>Health care and health-related goods and services must be physically accessible and economically affordable. They must be provided to all on a non-discriminatory basis. Information on health issues and on how to obtain services must be freely available, but confidentiality of personal health data must be maintained.</p>
<p>Acceptability.</p> <p>All health facilities must be respectful of medical ethics, culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, and designed to respect confidentiality and improve the health status of those concerned.</p>	<p>Quality.</p> <p>Health facilities, goods, and services must be scientifically and medically appropriate and of good quality. At a minimum, this requires skilled medical personnel, scientifically-approved and unexpired drugs and hospital equipment, safe water, and adequate sanitation and nutrition within health facilities.</p>

** The right to health should not be thought of as the right to be healthy; it is more properly conceptualized as the right to enjoy facilities, goods, services and conditions necessary for the realization of health.*

*The right to housing ensures access to a safe, secure, habitable, and affordable home with freedom from forced eviction.**

<p>Legal Security of Tenure.</p> <p>Governments must provide protection against forced eviction, harassment and other threats.</p>	<p>Availability of Services, Materials, Facilities, and Infrastructure.</p> <p>Available housing must allow access to natural and common resources, contain facilities essential for health, security, comfort and nutrition, provide access to safe drinking water, energy (for cooking, heating and lighting), sanitation systems, means of food storage, the disposal of refuse, drainage, and emergency services.</p>	<p>Affordability.</p> <p>Housing-related costs should be commensurate with income levels and states should establish housing subsidies for those unable to obtain affordable housing. Tenants should be protected against unreasonable rent levels or rent increases.</p>
<p>Habitability.</p> <p>Homes must contain adequate space and function to protect from cold, damp, heat, rain, wind or other threats to health and physical safety, structural hazards and disease.</p>	<p>Accessibility.</p> <p>Housing must be made accessible to all, on a non-discriminatory basis, and disadvantaged groups (such as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups) should be ensured some degree of priority consideration in the housing sphere.</p>	<p>Location.</p> <p>Housing should be located in areas with access to employment options, health care services, schools, childcare centers and other social facilities.</p> <p>Cultural Adequacy.</p> <p>Housing must appropriately enable the expression of cultural identity. Activities geared towards development or modernization of housing should ensure that the cultural dimensions of housing are not sacrificed, while simultaneously ensuring modern technical facilities.</p>

** While recognizing housing rights does not mean that the government is obligated to build housing for the entire population, or to provide housing at no cost, it does require that adequate and affordable housing be available in accordance with the above standards.*

The right to food guarantees freedom from hunger and access to safe and nutritious food.

<p>Availability.</p> <p>Food must be available, either directly from productive land or natural resources, or through well functioning distribution, processing and market systems responsive to demand.</p>	<p>Accessibility.</p> <p>Food must be both physically accessible and economically affordable. It must be provided on a non-discriminatory basis.</p>	<p>Cultural/consumer acceptability.</p> <p>It is necessary to take into account non-nutrient based values attached to food and food consumption and informed consumer concerns regarding the nature of accessible food supplies.</p>
<p>Free from adverse substances.</p> <p>Food must not contain adverse substances. This means the government must set and enforce health and safety standards for food quality and safety.</p>	<p>Dietary needs.</p> <p>Food must satisfy dietary needs. A diet consists of a mix of nutrients, calories and proteins necessary for physical and mental health and growth.</p>	

The right to work guarantees the opportunity to have dignified work under safe and healthy conditions and with fair wages affording a decent living for oneself and one's family.

<p>Opportunity.</p> <p>The right to work includes the right to the opportunity to gain a living by work which the individual freely chooses or accepts. The government must take appropriate steps to safeguard this right, including technical and vocational guidance and training programs, as well as policies to achieve productive employment.</p>	<p>Non-Discrimination.</p> <p>Discrimination in access to employment is strictly prohibited, including distinctions, exclusions, restrictions, or preferences, in law or practice, on the grounds of race, color, sex, nationality, political opinion, social origin, or age. Discrimination on the basis of sexual orientation or class should also be prohibited.</p>	<p>Just and Favorable Conditions.</p> <p>All workers must receive, at a minimum, fair wages and equal remuneration for work of equal value, such as to provide a decent living for themselves and for their families.</p>
<p>No Arbitrary Dismissal.</p> <p>Arbitrary dismissal is prohibited, and there must be adequate domestic resources for redress if a worker is arbitrarily dismissed.</p>	<p>Freedom of Association.</p> <p>Everyone has a right to join <i>free</i> trade unions. Unions have the right to strike and function freely.</p>	<p>Safe and healthy work conditions.</p> <p>Full realization of the right to work requires that available work be under safe and healthy conditions.</p> <p>Equal Opportunity.</p> <p>Opportunity for promotion must be available on a non-discriminatory basis.</p> <p>Right to Rest and Leisure.</p> <p>There must be a reasonable limitation of working hours, periodic holidays with pay, and remuneration for public holidays.</p>

The right to education ensures an education that enables all persons to participate effectively in a free society and is directed to the full development of the human personality.

<p>Availability.</p> <p>There must be sufficient school facilities and programs to support the population. Facilities must be safe and healthy, including sanitation facilities, clean drinking water, and trained instructors.</p>	<p>Accessibility.</p> <p>Education must be available on a non-discriminatory basis, be physically accessible and economically affordable.</p>	<p>Acceptability.</p> <p>Schools must have trained teachers receiving domestically competitive salaries and good quality teaching materials that respect cultural differences.</p>	<p>Adaptability.</p> <p>Education must be adaptable to the needs of changing societies and communities and responsive to the diverse needs of students, including students who do not speak the dominant language and students with disabilities.</p>
<p>Developmental Aims.</p> <p>The aims of education must be directed toward the development of each child's full potential and preparation to participate in society.</p>	<p>Dignity.</p> <p>Discipline must respect a child's dignity, and classrooms must create an environment of respect and tolerance.</p>	<p>Equity.</p> <p>There must be equitable distribution of resources in education across communities according to need.</p>	

The right to social security guarantees that everyone regardless of age or ability to work is guaranteed the means necessary to procure basic needs and services.*

<p>Comprehensiveness.</p> <p>The social security system should strive to provide comprehensive coverage against all contingencies and life circumstances that threaten income-earning and the ability of persons to maintain an adequate standard of living.</p>	<p>Adequacy and Appropriateness.</p> <p>Benefits should be provided at an adequate and appropriate level. The level should be need-based and sufficient to ensure that an individual does not fall below a clearly defined minimum subsistence level or poverty line. The kind of benefits provided should also be appropriate to the circumstances faced by the individual in need.</p>	<p>Equality.</p> <p>Provision of social security should be free from discrimination.</p>
		<p>Universality.</p> <p>Social security should be accessible to all those who need it.</p>
		<p>Procedural rights.</p> <p>The rules and procedures governing eligibility for social security programs, as well as the termination of benefits, must be reasonable and fair. Persons aggrieved by an adverse legal rule or administrative decision should have access to speedy, affordable and effective legal remedies for determination of their rights.</p>

**Social security benefits must be provided to those who are unable to work, temporarily or permanently, due to sickness, maternity, disability, old age, as well as in cases where the death of the head of the family causes the loss of support, or in cases of temporary unemployment.*

The six tables above list and define the various components of economic and social rights, but it is in jurisprudence around the world that these definitions are fleshed out within the context of real world applications. For example:

- ✦ In a case addressing the *accessibility* of health care, persons living with HIV in Venezuela petitioned the government to ensure a regular and consistent supply of drugs necessary for their treatment.³ While international laboratories located in Venezuela ensured the presence of the necessary drugs, the government had failed to budget and coordinate effectively to make the proper combination of drugs consistently available to patients as their treatment required. The Venezuelan Constitution requires that the government provide access to health services in compliance with international human rights conventions. Citing the relevant provisions of the UDHR, ICCPR and ICESCR, the Supreme Court found that to comply with the obligation to ensure access the government must put in place legislation creating an administrative structure capable of delivering the essential medications. Specifically, the Court found that the government's failure to ensure access to certain drugs for persons living with HIV violated the

³ López, Glenda y otros c. Instituto Venezolano de los Seguros Sociales (IVSS) s/ acción de amparo. Expediente 00-1343. Sentencia N° 487.

right to health, threatened the right to life, and breached the rights to the benefits of scientific and technological progress, and to social security.

- ✦ In the housing context, the South African Constitutional Court has grappled with what constitutes *accessibility* in the midst of an overwhelming housing crisis faced by a government with severely limited resources. *The Government of the Republic of South Africa vs. Grootboom*,⁴ discussed in greater detail below, involved the forcible eviction of complainants from land they had been occupying when alternative housing was simply not available. Using international standards as a guide, the Constitutional Court found that the government’s housing policy violated the right to housing, not because it failed to build housing for all homeless, but because it *failed to make any provisions for relief for those most desperately in need*. The Court recognized that the government was not obligated to go beyond its available resources to build housing and ensure access immediately, but found that the right to housing required that, in allocating its resources, the government must take into account the most desperate.

B. HOW DO WE DEFINE GOVERNMENT OBLIGATIONS WITHIN HUMAN RIGHTS?

When courts grapple with protecting human rights, one of the primary questions is exactly what is the government’s obligation to the plaintiff or class of plaintiffs. In the context of U.S. constitutional jurisprudence, the answer in most instances is that the government must refrain from interfering with the exercise of a right. Within human rights law, this is referred to as a “negative” obligation and is tied to the duty to *respect* human rights. But human rights law, as embedded in both international instruments and domestic jurisprudence around the world, imposes obligations on governments to both “*respect*” and “*ensure*” human rights.

Ensuring human rights is a positive obligation, i.e. it defines what a government must do rather than only what it must refrain from doing. Positive obligations, as noted above, are found in both state constitutions and in human rights law. Within human rights law, these obligations include both creating conditions whereby people can exercise their rights (such as functioning and equitable health and education systems) and protecting people from interference of their rights by private actors (including both institutions, businesses, and individuals). The former is considered the duty to fulfill rights and the latter the duty to protect – both of these are sub-parts of the duty to ensure rights. All these aspects of government obligations – positive and negative – are relevant to

⁴ *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000 (11) BCLR 1169, (Constitutional Court of South Africa, October 4, 2000).

economic and social rights.

DUTY TO RESPECT

The duty to respect is the most basic and traditional governmental duty regarding rights. Generally, the duty to respect entails non-interventionist conduct from the state. Thus, the government must respect individuals' right to seek employment, housing, medical care or education, and reasonably use available resources without interfering with those efforts. Examples of violations include forced or arbitrary evictions by government, unreasonable barriers to practicing a profession or engaging in trade, and forced medical treatment. This most basic level of non-interference by the government is comparable to the traditional conception of civil and political "negative" rights.

Duty to Respect: Ain o Salish Kendra (ASK) v Government and Bangladesh & Ors 19 BLD (1999) 488 (Supreme Court of Bangladesh, July 29, 2001).

After the government evicted slum residents without notice and demolished their homes, the Supreme Court of Bangladesh held that the duty to respect fundamental rights, particularly the right to life, required the government to refrain from actions that deprived people of basic necessities. Additionally, the court noted the positive obligation to develop policies aimed at ensuring the provision of the basic necessities of life, including shelter, thus finding a positive right to housing implicit in the right to life. While the Court acknowledged the government's concern with criminal behavior in the slums, it ordered the government to formulate a plan for evictions that would occur in phases, according to the ability of residents to find alternative accommodation, and to give reasonable notice before eviction.

DUTY TO PROTECT

To effectively protect human rights, governments must ensure that actions by private actors do not undermine or prevent their realization. Thus, government must regulate private conduct to protect rights and guarantee access to judicial, quasi-judicial, administrative, or political enforcement mechanisms capable of providing redress for rights violations by private actors. For example, a government must regulate minimum wage laws, threats posed by unethical behavior in trade and contract, or marketing and dumping of hazardous or dangerous products, or unreasonable rents and landlord harassment. In addition, it must create public and private enforcement mechanisms, such as regulatory agencies and private rights of action.⁵

⁵ Some treaties specifically require establishment of private remedy for those whose rights have been violated. For example, under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), States Parties shall assure to everyone within their jurisdiction "effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." Convention on the Elimination of All Forms of Racial Discrimination, art. 6 (emphasis added).

Duty to Protect: *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria, Communication No. 155/96 (2001).*

In a case challenging the Nigerian government's practice of condoning and facilitating the activities of oil companies by putting the legal and military powers of the government at the companies' disposal, the African Commission on Human & Peoples' Rights held that the Ogoni people had suffered violations of numerous rights under the African Charter, including the right to health and the implied right to housing that the Commission derived from the rights to property, health and family. Focusing on both the negative and positive obligations imposed on the government to protect these rights, the Commission stressed that governments have a duty to protect their citizens from damaging acts perpetrated by private parties and that this duty *requires positive action* on the part of the government.

DUTY TO FULFILL

The duty to fulfill requires governments to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures in order to create conditions whereby all people are enabled to exercise their human rights. This may involve public expenditure, appropriate regulation of the economy and land market, the provision of public services and related infrastructure, the redistribution of income, and other positive acts on the government's part. Examples of the duty to fulfill include national health insurance programs, assistance to needy families, etc.

Duty to Fulfill: *Viceconte, Mariela c. Estado Nacional (Ministerio de Salud y Ministerio de Economía de la Nación) s/ Acción de Amparo, Causa no. 31.777/96 (1998).*

In the late 1990s, an epidemic of hemorrhagic fever threatening the lives of 3.5 million people in Argentina. Although a vaccine could be developed, its development was too unprofitable to interest the private sector. Petitioners demanded that the government of Argentina take more effective action to fulfill the right to health by developing the vaccine. The Federal Court of Appeals found a violation of the right to health under the ICESCR and ordered that the state produce the vaccine within a specified time schedule, threatening to hold the Ministers of Health, Economy and Labor, and Public Services personally accountable. The Court found that the government must take these *specific concrete measures* in the face of such a health crisis in order to fulfill the right to health.

C. WHAT ARE THE APPROACHES TO JUDICIAL REVIEW OF POSITIVE OBLIGATIONS?

Judicial review of negative government obligations does not differ in kind whether the rights at issue are economic and social or civil and political. Thus, for economic and social rights, we have models from the civil and political sphere from which to draw for issues involving government interference. However, when it comes to the duty to fulfill or to protect, we have fewer models from which to draw, both in the United States and around the world.

On the international level – for purposes of monitoring human rights treaty compliance – three important principles have been identified regarding positive obligations of government:

1. Governments are obligated to take steps toward the **progressive realization** of economic, social and cultural rights;
2. Governments have an immediate obligation to guarantee a **minimum threshold** for these rights; and
3. Governments have an immediate obligation to protect these rights **without discrimination**.

These principles are found in Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, as well as General Comment 3 issued by the UN Committee on Economic, Social and Cultural Rights (see Appendix 1).

“Each State Party to the present Covenant *undertakes to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by all the *appropriate means, including particularly the adoption of legislative measures*.”⁶

But how have courts used these concepts in their domestic jurisprudence? One of the most influential courts on this question is the Constitutional Court of South Africa. South Africa has a very modern Constitution deeply influenced by international human rights law and the Constitutional Court’s decisions thus provide a fruitful source of models for the application of human rights law in a domestic court.

For example, in *The Government of the Republic of South Africa vs. Grootboom*, the South African Constitutional Court grappled with what constituted adequate shelter in the midst of an overwhelming housing crisis.⁷ *Grootboom* involved the forcible eviction of complainants from land they had been occupying, when they had no viable alternative for housing or shelter. Despite a vigorous government

⁶ ICESCR, Art. 2(1) (emphasis added). The Inter-American Commission addressed the binding character and justiciability of the duty to fulfill in its 1993 Annual Report: Inter-Am. C.H.R. 1993 Annual Report, Chpt. V, OEA/Ser/L/V/II.85 (1993). The Economic and Social Rights Committee, the UN body that oversees the ICESCR, has similarly found that government compliance generally includes: (a) meeting minimum core obligations; (b) implementing programs to progressively realize ESCR; and (c) no regression from established rights. CESCR General Comment 3.

⁷ *Government of the Republic of South Africa. & Ors v Grootboom & Ors*, 2000 (11) BCLR 1169, (Constitutional Court of South Africa, October 4, 2000).

effort to build affordable housing generally, the Court declared the South African government's housing policy to be unconstitutional because it failed to make any short term provisions for the most destitute -- homeless South Africans living in crisis. The Court did not afford immediate relief for the complainants, but rather ordered to legislature to create a reasonable plan.

In *Grootboom*, the South African Court developed a useful and instructive judicial standard of review to assess legislative action in the economic and social rights sphere. The Court took the notion of "progressive realization" of a right and placed it within a "reasonableness" framework familiar to courts in all jurisdictions. The Court stated the following in assessing whether legislative action through the housing program satisfied the obligation to fulfill the right to housing contained in South Africa's Constitution:

The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. *They must, however, ensure that the measures they adopt are reasonable.*

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state *is obliged to act to achieve the intended result*, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive.

These policies and programmes must be *reasonable both in their conception and their implementation*.

The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations. In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. *A programme that excludes a significant segment of society cannot be said to be reasonable*. Conditions do not remain

static and therefore the programme will require continuous review.

Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. *Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.*

It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. *If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*

In applying this standard, the Court decided that while the housing program was well designed and implemented with regards to medium and long-term goals, it was not reasonable to omit from the program emergency measures for the most desperate and vulnerable. At the same time, the Court decided that it could not order housing for the claimants, as that would lead to a rush to the courthouse for housing that would leave the program in disarray. Instead, the Court ordered the legislature to incorporate a plan into the overall housing program that would address the need for emergency shelter.

The reasonableness test employed here is clearly stronger than the rational review standard in U.S. constitutional jurisprudence, because it might not be irrational to prioritize investing very limited resources in longer term solutions for the housing crisis rather than stop gag measures. However, once the human rights principle that the most vulnerable must be prioritized was considered by the Court, it could not be seen as a reasonable legislative decision to ignore the severity of the claimants' situation. While requiring the legislature to address the claims of the most vulnerable, the reasonableness standard as applied by the Court allows for great flexibility on the part of the legislature so long as it takes concerted steps that are directed to realizing the rights at issue.

Grootboom's Reasonableness Standard:

In evaluating the government's obligation to take *reasonable* legislative and other measures to achieve the progressive realization of a right within available resources, *a reasonable measure must:*

- be reasonable in both in its conception *and in its implementation*
- clearly *allocate responsibilities* and tasks to the different spheres of government
- ensure that the *appropriate financial and human resources* are available
- take into account the needs of those *whose needs are the most urgent*
- *not exclude* a significant segment of society

In other jurisdictions, courts have applied other standards to review the government's fulfillments of its obligations to ensure social and economic rights. In Canada, for example, the government must justify any limitation of a right by establishing that the limitation is prescribed by law and the means chosen to attain the legislative goal are *reasonable and demonstrably justifiable in a free and democratic society*. To show that the means chosen by the legislature are "reasonable and demonstrably justifiable," the government has the burden to prove (a) that any violation of rights is rationally connected to the aim of the legislation; (b) that the legislation minimally impairs the right; and (c) that there is a "proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right."⁸

Reasonable and Demonstrably Justifiable: Eldridge v. British Columbia (Attorney General) [1997] 3 S.C.R. 624 (Canadian Supreme Court).

Deaf patients challenged the government's failure to provide sign language interpretation for health services. The Supreme Court of Canada held that the government failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of the right to equality for the disabled. The Court examined the costs of providing sign language interpretation, finding it to be only approximately 0.0025 percent of the provincial health care budget. The Court found that, under these circumstances, the refusal to expend such a relatively insignificant sum in order to provide the services requested could not justify an impairment of the deaf patients' rights.

Despite differences in jurisdictions, there are core ideas that courts grappling with these issues have tended to adopt, such as the need for some kind of balancing test that takes available resources into account, the requirement that government be seriously scrutinized on these issues, and the recognition of the important differences in the roles of courts and legislatures.

CHAPTER II: QUESTIONS FOR DISCUSSION

1. How do international economic and social rights differ (or not) from domestic economic and social rights?
2. Do these differences, if any, provide any added value for domestic law arguments?
3. Would the international law approach to government obligations – the duty to respect and ensure – be appealing to state courts?
4. Could transnational approaches to judicial review of positive governmental obligations be persuasive in relation to the governmental (in)actions challenged in your work?

CHAPTER 3

BRINGING IT TOGETHER

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As discussed above, state constitutions generally protect at least some economic and social rights. The right to education is found in almost every state constitution. State constitutions also address issues of health, labor, social welfare, protections for the mentally ill and disabled, and protection of the environment and natural resources.²⁸

Additionally, economic and social rights have been successfully adjudicated at the state level in several jurisdictions. Since these rights are explicitly contained in many state constitutions, state courts more readily recognize an obligation to fulfill them. But there are also several cases where state courts have failed to recognize that their own state's constitution differs substantively from the U.S. Constitution. In these instances, courts have applied very weak federal rational review standards to state legislation, asking only if the legislation was within the legislature's power and not whether it fulfilled the constitutional obligation imposed.²⁹ For example, the West Virginia Supreme Court has found that the state constitution requires the state to provide for the poor, but has deprived this requirement of all meaning by finding that *any* legislative action to aid the poor – irrespective of its effectiveness – meets constitutional muster.³⁰

The effect of applying federal rationality review to state constitutional questions gives extreme deference to state legislative decisions that affect the poor, and makes it essentially impossible to challenge the acts of the state legislature. Law professor Helen Hershkoff argues that use of the federal standards as a basis for state constitutional interpretation is inappropriate, in that they were developed to address federal institutional concerns that are not, or are at least less, relevant in the state context.³¹ In fact,

- ✦ States do not face the same separation of powers issues, in that the governmental structure is much more flexible at the state level. In fact, state courts often work with other branches of state government to create effective law and policy.

- ✦ Unlike the federal constitution, which is nearly impossible to amend – most state constitutions are frequently amended. In fact, during election cycles, many state ballots across the country include some proposal or referendum to amend the state constitution.³²

28 Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133-38 (1999); Bryan P. Wilson, *Comment, State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 Emory L.J. 627, 627 (2004).

29 Hershkoff, *Positive Rights and State Constitutions*, 112 Harv. L. Rev. at 1137.

30 *State ex rel. K.M. v. W. Va. Dep't of Health & Human Res.*, 212 W. Va. 783 (2002).

31 Hershkoff, *Positive Rights and State Constitutions*, 112 Harv. L. Rev. at 1137.

32 For state-by-state information on constitutional referenda, see http://www.iandrinstitute.org/statewide_i&r.htm. One dramatic example of the relative ease and speed with which state constitutions are amended occurred in relation to the controversy over homosexual marriage. The Supreme Judicial Court of Massachusetts held in November of 2003 that limitation of the protections of civil marriage to individuals of the opposite sexes lacked rational basis and violated state constitutional equal protection principles. *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (2003). Two years later, by the end of 2005, the voters of eighteen states had approved referenda to amend their state constitutions to define marriage as a heterosexual-only union. Richard F. Storror, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305, 307 (2006).

Consequently, a state court need not be as conservative in its interpretation of the meaning of the state constitution as is seen at the federal level, since it is not trumping the democratic process.

- ✦ Finally, the method of decision-making by state courts, as common law courts, has largely been to use interpretive tools. Transnational law, including international human rights treaties and the practices of other countries, provide useful sources of interpretive tools.

How, then, can progressive lawyers use transnational law in litigation to encourage state courts to develop an independent and vigorous economic and social rights jurisprudence?

A. TRANSNATIONAL LAW CAN HELP DETERMINE THE CONTENT OF A RIGHT

Human rights law, as found in international instruments and foreign case law, may be a useful source of authority because it has engaged in a thoughtful process of defining the content of specific rights. *Boehm v. Superior Court*, 178 Cal.App.3d 494 (1986), cited above, provides a good example of this. In applying the “minimum subsistence” clause of the California welfare statute, the court turned to the UDHR as authority to find that minimum subsistence had to include clothing, transportation and medical care – all of which the UDHR declares to be elements of an adequate standard of living.

State constitutions include language like “human dignity,” “public or general welfare,” or “aid to the needy.”³³ These are general phrases that beg for greater definition. The economic and social rights framework as found in human rights law is a valuable source for that definitional task, because it lays out the basic rights that one could argue necessarily constitute human dignity, welfare or appropriate aid to the needy.

Additionally, state constitutions recognize such things as the right to education or an obligation to the mentally ill or elderly that have not been fully defined. For example, in education, one pressing problem facing communities is the “school to prison pipeline” fueled by abusive zero tolerance policies and criminalization of schools. To date, most state constitutional education cases have focused on very important funding inequities. But the Convention on the Rights of the Child also provides fuel for challenging the outgrowth of zero tolerance policies as well, and provides that “school discipline

³³ See, e.g., Mont. Const., art. II § 4 (“The dignity of the human being is inviolable.”); Alaska Const., § 5 (“The legislature shall provide for public welfare”); N.Y. Const. art. XVII § 1 (“... the aid, care and support of the needy are public concerns and shall be provided by the state.”).

[must be] administered in a manner consistent with the child’s human dignity....”³⁴ Other human rights documents also require that discipline be part of the learning process, and not used to exclude students from schools.³⁵

Other areas for possible exploration include healthcare. For example, human rights law not only demands that services be affordable but also geographically available – an issue for poor rural communities. Examining the most pressing problems at the local level reveals the need for greater protection for these basic rights in ways that the international and foreign law definitions of rights may support.

B. TRANSNATIONAL LAW CAN ESTABLISH A POSITIVE OBLIGATION

In some cases, establishing a positive obligation at all would be a step forward. Many state constitutions were drafted using ambiguous language that makes it unclear whether legislatures have discretion or actual obligation to act within certain spheres. For example, some state constitutions simply describe welfare assistance as a matter of “public concern” but do not use language mandating that the legislature “shall provide” welfare.³⁶ Looking at court decisions around the world that impose positive obligations on legislatures or agencies under similar provisions may aid domestic courts construing similar language.

One example of the discomfort felt by some state courts in imposing positive obligations is found in *Moore v. Ganim*, in which the plaintiffs argued that Connecticut had an affirmative constitutional obligation to provide its citizens with a minimal level of subsistence because the Connecticut constitution incorporates preexisting rights, preserves various unenumerated rights in its preamble, and provides that “[a]ll men, when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.”³⁷ Despite acknowledging that the constitution’s framers clearly “intended some unenumerated natural rights to survive the drafting of the written constitution,” the majority concluded that this intention did not empower the court to recognize a constitutional right to minimum subsistence, despite Connecticut’s long history of care for the poor. They therefore found no constitutional basis upon which to challenge the legislature’s decision to terminate general assistance benefits after nine months.³⁸ Information about how other courts around the world have recognized a right to minimum subsistence might have been valuable in this context.

34 Convention on the Rights of the Child (CRC), Article 28 .

35 Elizabeth Sullivan, *Deprived of Dignity: Degrading Treatment and Abusive Discipline in New York City & Los Angeles Public Schools* (National Economic and Social Rights Initiative, 2007), pp. 1-3.

36 Compare Mich. Const. art. IV, § 51 (“matters of primary public concern”) with Kan. Const. art. VII, § 4 (“shall provide”).

37 *Moore v. Ganim*, 233 Conn. 557, 571 n.29 (Conn. 1995).

38 *Id.* at 601.

C. TRANSNATIONAL LAW CAN STRENGTHEN JUDICIAL REVIEW

Ensuring that state courts apply a meaningful standard of review for cases involving economic and social rights is clearly of paramount importance. Foreign law seems particularly suited to helping succeed in this task. Offering state court judges examples of foreign constitutions that are more similar to their own than the federal Constitution, as well as judicial decisions applying relevant constitutional provisions, may serve to provide clarity for state courts in developing their own jurisprudence.

Let's look again at the *Tilden v. Hayward* case, where the Delaware judge expressed strong disapproval of the state agency's practice of removing children from their families based on homelessness alone. The court stated:

... it has been shown time and again that it is more economical to house an intact family than to provide child protective services for a single child. That fact is abundantly clear in this case, where the State spends thousands of dollars supporting foster care arrangements for the children of the named plaintiffs, rather than provide rent assistance or transportation that would amount to a fraction of that sum.³⁹

The plaintiffs claimed that the Division of Child Protective Services (DCPS), contrary to state and federal law, had failed to implement and develop a reasonable preventive and reunification services program that, among other things, would provide necessary housing to keep families together. Specifically, the plaintiffs critiqued DCPS's failure to supply certain housing-related assistance – transportation to search for and secure housing, housing application fees, security deposits, first month's rent, and emergency rent supplements.

Under the South African model for judicial review, the DCPS would have been required to show that removing children from their families based on homelessness was *reasonable* – a difficult showing in light of the fact that keeping the family intact would require fewer, not greater, resources. It would also have to show that its policies took into account the needs of the most vulnerable – which again would have been close to impossible in this case. Similarly, under the Canadian model, the DSPS would be hard-pressed to prove that the practice was *reasonable and demonstrably justifiable* when the effect of the measure was to expend greater public resources in violation of the right than would be expended to protect it.

The remedy in this case would not have required directing the agency on how to run the program, but simply ordering the agency to develop its own solution under a scenario where they clearly already had the resources to do so. However, in many parts of the United States we are unaccustomed to

³⁹ *Tilden v. Hayward*, 1990 WL 131162, at *17 (Del.Ch. 1990).

courts questioning even the most extreme and irrational policies affecting economic and social rights – particularly if there is no clearly illegal discrimination involved. Strengthening judicial review at the state level is therefore a necessary element of reversing the current timidity of state court judges in exercising their responsibility to enforce these basic human rights.

CHAPTER III: QUESTIONS FOR DISCUSSION

1. What issues do you work on that would benefit from a fuller definition of economic and social rights?
2. How might human rights law be relevant to (re)defining these rights/issues?
3. What is the first step you could take toward incorporating human rights into your work?
4. How helpful is the standard of review for positive rights used by courts elsewhere?

APPENDIX 1

GENERAL COMMENTS 3, 4, 14

□□□

CESCR General comment 3. (General Comments)

GENERAL COMMENT 3

The nature of States parties obligations

(Art. 2, para. 1 of the Covenant)

(Fifth session, 1990) *

The nature of States parties obligations (art. 2, para. 1 of the Covenant)

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

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

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

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

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

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

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

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

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

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

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

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

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and cooperation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized ...".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).

Notes:

* Contained in document E/1991/23.

1/ G.A. Cornia, R. Jolly and F. Stewart, eds., Oxford, Clarendon Press, 1987.

2/ Oxford, Oxford University Press, 1990.

3/ Oxford, Oxford University Press, 1990.

CESCR General comment 4 . (General Comments)

GENERAL COMMENT 4

The nature of States parties obligations

Sixth session (1991)*

The right to adequate housing (art. 11 (1) of the Covenant)

1. Pursuant to article 11 (1) of the Covenant, States parties “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

2. The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third (see E/1989/22, para. 312) and fourth sessions (E/1990/23, paras. 281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987.[1] The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[2]

3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing[3] article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.

4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed.[4] There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing.

5. In some instances, the reports of States parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the State concerned. This general comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

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

7. In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the

right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost”.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notes:

* Contained in document E/1992/23.

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

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

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

4 See note 1.

5 Geneva, World Health Organization, 1990.

CESCR General comment 14. (General Comments)

GENERAL COMMENT 14

The nature of States parties obligations

Twenty-second session (2000)

The right to the highest attainable standard of health (art. 12)

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

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

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

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

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

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

1. Normative content of article 12

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

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

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

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.[4] Moreover, formerly unknown diseases, such as human immunodeficiency virus and acquired immunodeficiency syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

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

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

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

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

(i) **Non-discrimination:** health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds:[7]

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

(iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households;

(iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas^[8] concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality;

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

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

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

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

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

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

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

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

16. “The prevention, treatment and control of epidemic, endemic, occupational and other diseases” (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to

States’ individual and joint efforts to, inter alia, make available relevant technologies, using and improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d): The right to health facilities, goods and services^[15]

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

Article 12: Special topics of broad application

Non-discrimination and equal treatment

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

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.^[16] Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

Gender perspective

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

Women and the right to health

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

Children and adolescents

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

male children.[18] Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

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

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

Older persons

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

Persons with disabilities

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

Indigenous peoples

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

Limitations

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

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

2. States parties' obligations

General legal obligations

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

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

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

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.[23] The obligation to respect requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to protect requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

Specific legal obligations

34. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.[24] In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

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

36. The obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of

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

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

International obligations

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

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.[27] States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

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

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

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

Core obligations

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

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

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

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

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

3. Violations

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

47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources

for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.

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

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

Violations of the obligation to respect

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

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the

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

Violations of the obligation to fulfil

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

4. Implementation at the national level

Framework legislation

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

The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

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

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

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

Right to health indicators and benchmarks

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

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

Remedies and accountability

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

60. The incorporation in the domestic legal order of international instruments

recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.[31] Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

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

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil

society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

5. Obligations of actors other than States parties

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

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

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

Adopted on 11 May 2000.

Notes:

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

[2] In its resolution 1989/11.

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

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

[5] See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.

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

[7] See paragraphs 18 and 19 of this general comment.

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

[9] In the literature and practice concerning the right to health, three levels of health care are frequently referred to: primary health care typically deals with common and relatively minor illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; secondary health care is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specialty-trained health professionals and doctors, special equipment and sometimes inpatient care at comparatively higher cost; tertiary health care is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specialty-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary,

secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

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

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

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

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

[14] ILO Convention No. 155, article 4.2.

[15] See paragraph 12 (b) and note 8 above.

[16] For the core obligations, see paragraphs 43 and 44 of the present general comments.

[17] Article 24.1 of the Convention on the Rights of the Child.

[18] See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".

[19] Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

[20] See general comment No. 13, paragraph 43.

[21] See general comment No. 3, paragraph 9; general comment No. 13, paragraph 44.

[22] See general comment No. 3, paragraph 9; general comment No. 13, paragraph 45.

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

[24] General Assembly resolution 46/119 (1991).

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

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

[27] See paragraph 45 of this general comment.

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

[29] Covenant, art. 2.1.

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

[31] See general comment No. 2, paragraph 9.

APPENDIX 2

CASES

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CASES

U.S. COURT DECISIONS INVOKING INTERNATIONAL HUMAN RIGHTS LAW

United States courts at both the state and federal levels have looked to transnational law for over a century to determine governmental obligations and help interpret common law and statutes. Below are some instances where courts have looked to transnational law for its persuasive or interpretive value.

U.S. Supreme Court

Lawrence v. Texas, 539 U.S. 558 (2003). *Lawrence* cited the 1967 Act of the English Parliament and the leading 1981 European Court of Human Rights decision, *Dudgeon v. United Kingdom*, and subsequent European Human Rights Court decisions affirming the protected right of homosexual adults to engage in intimate, consensual conduct.

Atkins v. Virginia, 492 U.S. 302 (2002). In concluding that the US could not execute the mentally retarded, the Court took account of practice in American states, but also invoked a brief filed by the European Union which catalogued the overwhelming repudiation of the practice by the rest of the world.

Roper v. Simmons, 125 S.Ct. 1183 (2005). The majority of the Court found foreign sources “instructive” in interpreting “evolving standards of decency” under the Eighth Amendment and acknowledged the “overwhelming weight of international opinion against the juvenile death penalty,” citing specifically to the CRC, ICCPR, state practice, and U.K. law.

State Courts

Economic & Social Rights

Boehm v. Superior Court, 178 Cal.App.3d 494 (1986). The court cited to the Universal Declaration to support its interpretation of California’s welfare statute to include provision of food, clothing and housing allowances.

Moore v. Ganin, 223 Conn. 557 (1995) (Peters, J, concurring). The concurring judge looked to the UDHR and the ICESCR to determine the scope of government’s obligations to provide for the poor.

Batista v. Batista, 1992 Conn.Super. LEXIS 1808, *18 (Conn. Super. 1992). In a custody case, the superior court expressed “great concern and embarrassment” that the United States had not signed the CRC. The court cited Article 12 of the CRC to give “due weight” to the child’s fear of her mother and award custody to the father.

In re Robert H., 118 N.H. 713 (1978). In a suit for termination of parental rights, the court cited to the ICCPR and ICESCR in support of family integrity and parental rights under the New Hampshire Constitution.

Wilson v. Hacker, 101 N.Y.S.2d 461, 472-73 (N.Y. Sup. Ct. 1950). The court invoked the rights in the UDHR to non-discrimination, to work, and to strike in finding that excluding women from bartending was unjustifiable.

Pauley v. Kelly, 162 W. Va. 672, 679, 708-09 (W. Va. 1979). The West Virginia Supreme Court invoked the UDHR to review the financing scheme for public schools and to define the right to education.

Commonwealth v. Sadler, 1979 Phila. Cty. Rptr LEXIS 92 (Comm. Pleas Ct. 1979). A Pennsylvania trial court reviewed the state’s failure to provide a 15-year-old defendant with schooling while in custody in light of the UDHR.

In re D.A., 794 P.2d 1177, *6-10 1990 Kan.App. Lexis 453 (Kan. Ct. App. 1990). The Kansas Court of Appeals examined the UN Declaration on the Rights of the Child as part of its refusal to restore custody of a child to a Mexican national who had been accused of abuse.

Adoption of Peggy, 436 Mass. 690 (Mass. 2002). Despite finding that the CRC was not binding on Massachusetts courts, the court applied provisions of the CRC to permit the termination of a father's parental rights.

In re Julie Anne, 121 Ohio Misc. 2d 20, 40-47 (Ohio Ct. Common Pleas. 2002). The court relied on the CRC to prohibit a child's mother from smoking tobacco in her presence. The court further noted that the convention was "the most universally accepted human rights document in the history of the world" and "created obligations for signatory governments."

Civil & Political Rights

Brennan v. State of Florida, 754 So.2d 1 (Fla. 1999) (Amstead, concurring). A concurring judge considered the ICCPR in a case where the court struck down the juvenile death penalty under the Florida Constitution.

Sterling v. Cupp, 290 Ore. 611 (1981) & **Bott v. Deland**, 922 P.2d 732 (1996) (rev'd on other grounds). In these cases, the courts considered international legal standards for the treatment of prisoners to determine whether their current treatment violated the state constitutions.

Bixby v. Pierno, 4 Cal. 3d 130 (Cal. 1971). The court cited the UDHR as evidence that the right to practice one's trade is a fundamental right and any administrative agency actions that impinge on that right therefore deserve heightened court scrutiny.

Am. Nat'l Life Ins. Co. v. Fair Employment & Housing Comm., 32 Cal. 3d 603 (Cal. 1982). The court cited Article 2 of the Universal Declaration for the principle of non-discrimination against the physically handicapped in deciding an employment discrimination claim.

Santa Barbara v. Adamson, 27 Cal. 3d 123 (Cal. 1980). In striking down an ordinance prohibiting five unrelated persons from residing together in a "family residence zone" the California Supreme Court cited Article 12 of the Universal Declaration's protection of the right to privacy.

Federal Courts

Nicholson v. Williams, 203 F.Supp.2d 153 (E.D.N.Y. 2002). The court used international law to support the right to family integrity protected by 14th Amendment due process rights (based on UDHR, ICCPR, CRC) in a decision granting a preliminary injunction against child welfare policy of removing children in instances where mothers were victims of domestic violence.

Beharry v. Reno, 183 F.Supp.2d 584 (E.D.N.Y. 2002) (rev'd on other grounds). The court considered the retroactivity of the mandatory deportation requirement under immigration statutes and determined that they should be interpreted in light of treaty obligations and customary international law that recognized the right to family integrity and the best interests of the child standard.

Upholding the Right to Health under Domestic Law

Argentina

Asociacion Benghalensis y otros c/ Ministerio de Salud y Accion Social - Estado Nacional s/ amparo ley 16.986, CSJN, 1/6/2000, L.L. (2000-A-986, 13) (Arg.) (Moline O'Connor, and Boggiano, JJ., concurring). Supreme Court upheld decision ordering national government to grant timely and appropriate medical treatment, including the provision of any required medications, to patients affected by HIV/AIDS, enforcing state duty in national law and constitutional right to health care (see Arg. Const. (1994) art. 42).

Campodonico de Beviaqua, Ana Carina c/ Ministerio de Salud y Accion Social - Secretaria de Programas de Salud y Banco de Drogas Neoplasicas, CSJN, 24/10/2000, L.L. (2000-C-823) (Arg.). Court held that government obligated to provide expensive medication to a four-year-old child whose union-owned health insurance had lapsed due to financial collapse, ruling that the state duty derives from language of international human rights law included in the Constitution.

Colombia

Ceballos v. Instituto de Seguros Sociales, T-484 (Corte Constitucional de Colombia 1992). Court held that state has obligations to provide medications in HIV/AIDS cases and social security institute obliged to provide ARV treatment under principles of non-discrimination and solidarity.

Gomez v. Hospital Universitario del Valle, T-505 (Corte Constitucional de Colombia 1992). Court found that hospital was required to provide AIDS patient the necessary services; the state is required, under the right to health in Article 13 of the Colombian Constitution, to provide special protection when the lack of economic resources "prevents a person from decreasing the suffering, discrimination, and social risk involved in being afflicted by a terminal, transmissible, and incurable illness"; infectious nature of HIV/AIDS is factor in reasonableness of state's actions to promote right to health.

Laverde v. Caprecom, T-499 (Corte Constitucional de Colombia 1992). Court ordered hip surgery for postal worker who could not complete work tasks with her condition; court specifically noted that health treatments become fundamental rights when they implicate other rights, such as the right to work.

Rivera v. Estado Colombiano, T-533 (Corte Constitucional de Colombia 1992). Eye surgery ordered for 63-year old man without family support who otherwise would not be able to work.

Alejandro Moreno Alvarez v. Estado Colombiano, SU.819/99 (Corte Constitucional de Colombia 1999). Court held that social security institute has obligations to provide essential medications and services to avoid the destruction of the population's earning capacity; judgment serves to unify jurisprudence on right to health and social security services, setting out four-point test regarding when the right to health services becomes justiciable: 1) health issue must implicate other rights that are classified as "fundamental," such as life, work or education; 2) there must be a "grave and imminent threat to human life or health" presented by the failure of the state to provide services; 3) plaintiff must be in extreme need of services, including financial as well as physical need; 4) the possibilities of providing services in the concrete case must lie within the resources of the state.

Costa Rica

Alvarez v. Caja Costarricense de Seguro Social, Exp. 5778-V-97, No. 5934-97 (Sala Constitucional de la Corte Suprema de Justicia de Costa Rica). Social security institute obliged to provide ARV treatment to people living with HIV/AIDS.

India

C.E.S.C. Limited v. Subas Chandra Bose, A.I.R. 1992 S.C. 572 (India). Court held that state has obligations to provide certain medications in case concerning provision of health services to employees.

Society of India v. Fertilizers and Chemicals Travancore, A.I.R. 1994 Ker. 308 (India). Court found that right to wholesome environment is implicit in Article 21 of the Constitution, relying on a 1984 U.N. Resolution holding that an environment adequate for health and well-being was a fundamental right.

Samity v. State of West Bengal, A.I.R. 1996 S.C. 2426 (India). Court found that the right to life in Indian Constitution constitutes right to emergency medical treatment where claimant had suffered serious head injuries and brain hemorrhage as a result of having fallen off a train; Court explained that “[p]roviding adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. . . . Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. . . . Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life guaranteed under Article 21.”

Philippines

Minors Oposa v. Factoran, [1993] Supreme Court of Philippines, G.R. No. 101083, *reprinted in* 33 I.L.M. 173 (1994). Court held that the state should stop providing logging licenses in order to protect the health of present and future generations; decision based on Article II of the Declaration of Principles and State Policies of the 1987 Philippine constitution, which sets forth the rights to health and ecology (see Phil. Const. art. II, §§ 15-16).

South Africa

Minister for Health v. Treatment Action Campaign, Constitutional Court of South Africa, Case CCT 8/02. Constitutional Court held that Government is required “to devise and implement a comprehensive and coordinated programme to progressively realize the right of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.”

Venezuela

Bermudez et al. v. Ministerio de Sanidad y Asistencia Social, Supreme Court of Justice of Venezuela, Case No. 15.789, Decision No. 916 (1999). Court declared that the right to life was a “positive right”; Court found that every Venezuelan was at least entitled to necessary HIV medication because of that right and ordered Ministry of Health to conduct an effective study into the minimum needs of people living with HIV/AIDS for consideration in the next budget.

Lopez v. Instituto Venezolano de Seguros Sociales, 487-060401 (Supreme Court of Venezuela, Constitutional Chamber 1997). Court held that state has obligations to provide medications in HIV/AIDS cases.

Canada

Eldridge v. British Columbia, Supreme Court of Canada, 3 S.C.R. 624 (1997). Court held that the right to substantive equality in healthcare places affirmative obligations on governmental actors to allocate resources to ensure that disadvantaged groups have full advantage of public benefits. This includes the right to a sign-language interpreter during healthcare provision.

European Committee on Social Rights

International Federation of Human Rights Leagues (FIDH) v. France, European Committee on Social Rights, Complaint No. 13/2003 (2003). Committee held that any “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State party, even if they are there illegally, is contrary to the Charter.” However, since all foreign nationals could at any time obtain treatment for “emergencies and life threatening conditions,” the Committee found that France only violated the right to medical assistance as to children.

Upholding the Right to Housing under Domestic Law

South Africa

Government of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). Court held that state housing policy failed to meet reasonable provision of services standard under Chapter 2, Section 26 of the South African Constitution.

Minister of Public Works & Ors. V. Kyalami Ridge Environmental Association & Ors, Constitutional Court of South Africa, 1 LRC 139, 3 CHRLD 313 (2002). Court upheld the government's establishment of a transit camp for flood victims without consultation with the area's residents association. The government's constitutional obligations with respect to the right to housing includes "the need to facilitate access to temporary relief for people who [have] no access to land, no roof over their heads, for people living in intolerable conditions and for people who were in crisis because of natural disasters such as floods and fires, or because their home was under threat of demolition."

European Committee on Social Rights

European Roman Rights Centre v. Greece, European Committee on Social Rights, Complaint No. 15/2003 (2004). Court held that a significant number of Roma living in conditions that fail to meet minimum standards was a breach of the obligation to promote the right of families to adequate housing. The Committee further held that Greece violated the right to housing by not providing infrastructure at Roma camping sites.

Bangladesh and India

Shantistar Builders v. Narayan Khimalal Totame, Supreme Court of India, Civil Appeal No. 2598/1989, 1 SCC 520 (1990). Court held that the right to life includes "the right to a decent environment and a reasonable accommodation to live in." Shelter has to be a suitable accommodation that allows a human being to grow and develop in physical and mental aspects.